Office - Supreme Court, U.S.
FILED
AUG 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-233

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

OWEN H. BROOKS, *et al.*,
Appellants,
v.
WILLIAM F. WINTER, Governor, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

JURISDICTIONAL STATEMENT

WILLIAM L. ROBINSON
*FRANK R. PARKER
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

ROBERT BRUCE MCDUFF
RATNER & SUGARMON
Suite 525
Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

Attorneys for Appellants

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. May a three-judge district court panel following *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982), defer to the articulated state racial policies to which the Attorney General interposed an objection pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c?

2. In ordering into effect an interim congressional reapportionment plan, is a District Court panel bound to remedy the condition which gave rise to a Section 5 objection?

3. May a District Court panel order into effect an interim redistricting plan which fails to satisfy the criteria for court-ordered plans set forth in *Connor* v. *Finch*, 431 U.S. 407 (1977)?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
THE QUESTIONS ARE SUBSTANTIAL	8
I. THE DISTRICT COURT'S DETERMINATION TO IMPLEMENT A COURT-ORDERED PLAN WHICH EMBODIES THE RACIAL POLICIES OF THE OBJECTED-TO PLAN IS CLEARLY ERRONEOUS AND VIOLATES CONTROLLING PRECEDENTS OF THIS COURT	9
A. The District Court's Decision to Adopt the Racial Policies of the Objected-to Plan Is Not Compelled by *Upham* v. *Seamon* and Is Contrary to this Court's Rulings in *Upham*, *McDaniel* v. *Sanchez*, and *White* v. *Weiser*	9
B. Under the Section 5 Preclearance Procedures of the Voting Rights Act, the District Court Was Without Jurisdiction to Consider the Validity of and Approve the State's Racial Policies Embodied in S.B. 2001	14
C. Alternatively, the District Court Erred in Approving the State's Racial Policy of Creating Majority White, 40% Black Districts and Implementing that Policy in the Simpson Plan Because that Policy Is Rooted in Purposeful Racial Segregation	16
II. THE DISTRICT COURT-ORDERED PLAN VIOLATES THE GUIDELINES ESTABLISHED BY THIS COURT IN *CONNOR* v. *FINCH* AND FAILS TO REMEDY BLACK VOTE DILUTION	23

TABLE OF CONTENTS—Continued

Page

CONCLUSION 30

APPENDIX

Appendix A. District Court Decision and Order (Filed June 9, 1982) 1a

Appendix B. Attorney General's Section 5 Objection Letter (Dated March 30, 1982) 25a

Appendix C. *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C. June 28, 1982) 31a

Appendix D. Notice of Appeal (Filed June 15, 1982) 41a

Appendix E. Constitutional Provisions and Statutes Involved 45a

TABLE OF CASES

Page

Allen v. *State Board of Elections*, 393 U.S. 544 (1969) 16
Beer v. *United States*, 425 U.S. 130 (1976) 28
Brooks v. *Winter*, 50 U.S.L.W. 3998 (1982) 8
Burton v. *Hobbie*, Civ. No. 81-617-N (M.D.Ala., June 21, 1982) 9
Busbee v. *Smith*, Civ. No. 82-0665 (D.D.C. July 22, 1982) 9
Bussie v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D.La. 1971) 29
Chapman v. *Meier*, 420 U.S. 1 (1975) 30
City of Rome v. *United States*, 446 U.S. 156 (1980) 14
Connor v. *Finch*, 431 U.S. 407 (1977) ..... 2, *passim*
Connor v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966) (three-judge court), *aff'd mem.*, 386 U.S. 483 (1967) 21, 23
Connor v. *Waller*, 421 U.S. 656 (1975) 16
Gaffney v. *Cummings*, 412 U.S. 735 (1973) 29
Hathorn v. *Lovorn*, —— U.S. ——, 50 U.S.L.W. 4664 (1982) 15
Karcher v. *Daggett*, —— U.S. ——, 50 U.S.L.W. 3767 (1982) 29
Kirksey v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139 (5th Cir.) (*en banc*), *cert. denied*, 434 U.S. 968 (1977) 24, 28
McDaniel v. *Sanchez*, 452 U.S. 130 (1981) ..... 9, *passim*
Mississippi v. *Smith*, Civ. A. No. 82-0956 (Filed June 28, 1982) 2, 3
Mississippi v. *United States*, 490 F. Supp. 569 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980) 8, 24
Moore v. *Leflore County Board of Election Commissioners*, 502 F.2d 621 (5th Cir. 1974) 24
Perkins v. *Matthews*, 400 U.S. 379 (1971) 16
Robinson v. *Commissioners Court, Anderson county, Texas*, 505 F.2d 674 (5th Cir. 1974) 24
Rogers v. *Lodge*, 50 U.S.L.W. 5041 (U.S. July 1, 1982) 15

TABLE OF CASES—Continued

	Page
Roman v. *Sincock*, 377 U.S. 695 (1964)	24
Seamon v. *Upham*, 536 F. Supp. 931 (E.D. Tex. 1982) (three-judge court)	11, 12
Sims v. *Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court)	24
Taylor v. *McKeithen*, 407 U.S. 191 (1972)	16
United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977)	28
United States v. *Board of Commissioners of Sheffield*, 435 U.S. 110 (1978)	16
United States v. *Mississippi*, 380 U.S. 128 (1965)	17
Upham v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982)	7, *passim*
White v. *Weiser*, 412 U.S. 783 (1973)	8, passim

STATUTES:

28 U.S.C. 1253	3
28 U.S.C. 2284	3
42 U.S.C. 1973c	2, 3

CONGRESSIONAL REPORTS:

S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

---

JURISDICTIONAL STATEMENT

Appellants, black citizens and registered voters of Mississippi,[1] appeal from the final judgment of the United States District Court for the Northern District of Mississippi, entered June 9, 1982, ordering into effect a

---

[1] Appellants in this case are Owen H. Brooks, Sarah B. Johnson, Rev. Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry, individually and on behalf of all others similarly situated.

Appellees are William F. Winter, Governor of Mississippi, William A. "Bill" Allain, Attorney General of Mississippi, Edwin Lloyd Pittman, Secretary of State of Mississippi, in their official capacities as members of the Mississippi State Board of Commissioners, and the State Board of Election Commissioners, Mississippi Democratic Executive Committee, and Mississippi Republican Executive Committee.

court-ordered congressional redistricting plan which deprives black voters of an opportunity to elect candidates of their choice in any of the five districts. Appellants contend that the District Court used an incorrect legal standard in deferring to the state racial policies which gave rise to a Section 5 objection by the Attorney General, failed to remedy the condition which precipitated the objection, and failed to follow the criteria for court-ordered interim reapportionment plans set forth by this Court in *Connor* v. *Finch*, 431 U.S. 407 (1977).

Because of the need to define the appropriate constitutional and statutory guidelines for court-ordered congressional reapportionment plans in the wake of the 1980 Census, appellants move the Court for an expedited appeal.

OPINIONS BELOW

The opinion of the three-judge District Court for the Northern District of Mississippi is unreported and is set out in Appendix A. The Attorney General's objection rendered pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to the legislatively-enacted "Least Change" plan is included as Appendix B.

An interim opinion of a three-judge District Court for the District of Columbia in Mississippi's Section 5 lawsuit to preclear the "Least Change" plan, *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C. June 28, 1982), denying the state's motions for partial summary judgment and to exclude certain evidence, is also unreported and is included in Appendix C.

JURISDICTION

The judgment of the three-judge District Court, ordering into effect a court-ordered congressional redistricting plan, was entered on June 9, 1982. Appellants filed a notice of appeal on June 15, 1982, Appendix D, attached.

This appeal is being docketed in this Court within 90 days of the entry of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fourteenth Amendment; 42 U.S.C. 1973c. (Included verbatim as Appendix E).

STATEMENT OF THE CASE

In August, 1981 the Mississippi Legislature enacted S.B. 2001 (Miss. Laws, 1981 Extra. Sess., ch. 8), known as the "Least Change" plan, redistricting the state's five congressional districts, and submitted the new plan to the Attorney General of the United States for preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. This plan continued the state's practice, first adopted in 1966 directly after passage of the Voting Rights Act, of dividing the heavy black population concentration of the Mississippi Delta area in the northwest portion of the state among several majority white congressional districts. All five congressional districts in S.B. 2001 were majority white in population; the highest black percentages were 47.95% (District 2) and 45.32% (District 4).[2]

After requesting additional information, the Attorney General interposed a timely objection to S.B. 2001 on March 30, 1982 (Appendix B, attached). In objecting, the Attorney General found:

---

[2] The black population percentages in each district of S.B. 2001 were:

District	% Black
1	29.79%
2	47.95%
3	33.38%
4	45.32%
5	19.54%

Memorandum Opinion (hereinafter "Mem. Op.") p. 6a, Appendix A.

Since the late 1800's and until 1966, the State of Mississippi maintained a Congressional districting configuration which included a majority black district in the Mississippi Delta area. The state's reapportionment of 1966 did not continue a Delta district similar to the one which at that time had included a sixty-five percent black population majority. Rather, the 1966 plan inaugurated a districting configuration which fragmented the Delta area among three districts.

* * * *

Our analysis shows that, according to 1980 Census data, the State is authorized five congressional districts and has a population which is 35.2 percent black. The black population in large part still is concentrated in the Delta region. District Nos. 1, 2, and 3 of the reapportionment plan [S.B. 2001] have been drawn horizontally across the majority-black Delta area in such manner as to dismember the black population concentration and effectively dilute its voting strength.

Alternate proposals were presented to the reapportionment body which would have avoided the fragmentation and dilution of minority voting strength in the Delta area, and we have received complaints that such alternate proposals were rejected for racially discriminatory reasons. Our own review has revealed that, in fact, reasonable alternatives could be drawn which would avoid the fragmentation and dilution of minority voting strength in the Delta area and the State's submission offers no satisfactory explanation for, or governmental interest in, the rejection of such alternatives. The adoption of the east-west configuration which recognizes the Delta as a community of interest, suggests to us an unnecessary retrogression in the position of black voters in Mississippi.

Accordingly, we are unable to conclude that the submitted plan meets the requirements of the Act in its treatment of the Delta area. I must, there-

> fore, on behalf of the Attorney General, interpose an objection to Senate Bill No. 2001 pursuant to Section 5 of the Voting Rights Act of 1965.

Appendix B, Section 5 objection letter, pp. 26a-28a.

Although the Mississippi Legislature was in session when the Attorney General's objection was announced, it adjourned without enacting a new plan and instead filed a Voting Rights Act declaratory judgment action in the District Court for the District of Columbia seeking judicial preclearance of S.B. 2001. Mem. Op., pp. 2a-3a. That action is still pending. *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C., filed April 7, 1982), memorandum opinion and order denying plaintiffs' motion for partial summary judgment and motion *in limine*, June 28, 1982 (Appendix C, attached).

Appellants, twelve black voters of Mississippi who reside in the Delta area and who represent a class certified as all voters and all black voters of Mississippi, filed this action on April 5 requesting injunctive relief against S.B. 2001, challenging the constitutionality of the preexisting congressional districts (the 1972 plan) for excessive population malapportionment, and seeking a court-ordered congressional redistricting plan for the 1982 Mississippi congressional elections which protects their rights secured by the United States Constitution and the Voting Rights Act. A three-judge District Court was convened pursuant to 28 U.S.C. § 2284, and the District Court entered an order temporarily postponing the July 1 party primary elections for congressional candidates and held a hearing on May 13-14.

Appellants urged the District Court to order into effect one or the other of two plans (the "Kirksey plans") which kept the Delta area intact, and, to create an equally-populated Delta district, combined the Delta area with adjoining, predominantly black portions of Hinds County and Jackson resulting in a majority black district in each plan, Mem. Op., pp. 7a-8a. Appellants' pre-

ferred plan had one majority black district which was 64.37% black, and the "fall-back" plan had a majority black district which was 65.81% black. *Id.*[3] The AFL-CIO, as amicus curiae, urged the court to order into effect a plan (the "Simpson plan") which combined the black-majority Delta area with six predominantly white counties in the east-central portion of the state to produce four majority white districts and one district with a slight black population majority of 53.77%. Mem. Op., p. 8a. All five districts in the Simpson plan, however, are majority white in voting age population.[4]

In its opinion, the District Court held that the existing districts were unconstitutionally malapportioned, enjoined implementation of S.B. 2001 because of the Section 5 objection, and determined that all three plans before it met Federal constitutional requirements. Mem. op., pp. 9a-11a. Thus, the District Court held the dispute to "center around claims of dilution of black voting strength." *Id.* at 7a. Citing lack of time and ability independently to create its own plan, the lower court confined its decision to a choice between the two plans submitted by the appellants and the Simpson plan, *id.* at 9a, 11a, which had been developed by the staff of the Mississippi Legis-

---

[3] According to the District Court's opinion, the black population percentages in each of the five districts under each plan is:

District	Kirksey Plan 1	Kirksey Plan 2	Simpson Plan
1	25.60%	25.72%	25.86%
2	64.37%	65.81%	53.77%
3	32.49%	30.36%	31.23%
4	33.83%	33.70%	45.25%
5	19.75%	20.33%	19.84%

Mem. Op., pp. 7a-8a.

[4] The District Court found that the black voting age population of districts is approximately 5% lower than total black population figures. Mem. Op., p. 5a, n.3. The U.S. Census voting age population statistics by race introduced in evidence (Ex. C-1, Attachment C) indicate that the 53.77% black population majority district in the Simpson plan is 48.06% black in voting age population.

lature's Joint Congressional Redistricting Committee on motion of Representative James C. Simpson, a white legislator, *id.* at 8a.

Relying on *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982) (Mem. Op., p. 11a), the District Court felt itself bound by "the state's primary political policies reflected in the passage of S.B. 2001," *id.* at 12a, which it summarized as:

> (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. As to the latter policy, the majority of the Joint Committee and legislature subscribed to the belief that a plan with two minority districts containing at least 40% black population was preferable to a plan that sacrificed two such "high impact" minority districts for one district with a significant black majority.

Id.

Accordingly, the District Court felt compelled by *Upham* to adopt the Simpson plan on an interim basis pending adjudication of the Section 5 preclearance action in the D.C. District Court. The District Court also determined that the Simpon plan more nearly satisfied the State's S.B. 2001 criteria of "preservation of the electoral base of incumbent congressmen" (all of whom are white)[5] and "least possible population deviation" (*id.*) by maintaining a population deviation of only .2141%.[6] *Id.* at 14a.

The State of Mississippi has stipulated that because of the state's past history of discrimination in voting

---

[5] All three plans preserved Mississippi's five incumbent congressmen in their respective districts, and ensured that none of the incumbent congressmen would have to run against each other for reelection. May 13-14 Hearing Transcript, pp. 47, 55.

[6] The total deviations in the Kirksey plans were only 0.2150% and 0.230%, respectively. Mem. Op., p. 7a.

and other areas and racial bloc voting, a district generally must be at least 65% black in population or 60% black in voting age population to provide black voters with an opportunity to elect candidates of their choice to public office.[7]

Plaintiffs filed their notice of appeal to this Court on June 15. On June 21 this Court denied plaintiffs' application for a stay and for interim relief pending appeal without opinion. *Brooks* v. *Winter*, No. A-1084, 50 U.S.L.W. 3998.

THE QUESTIONS ARE SUBSTANTIAL

This case directly poses the important question of whether a District Court is obliged by this Court's decisions to defer to the racial policies of a Voting Rights Act-covered state embodied in a plan objected to under Section 5, and to order into effect a plan which deprives black voters of the opportunity to elect candidates of their choice in all five districts, as opposed to a proposed plan which would give black voters an equal opportunity to elect candidates of their choice in one district.

The question is a substantial one, because the effect of the District Court's decision is to supplant the discriminatory, objected-to plan with a court-ordered plan which also dilutes black voting strength, although in a different manner. The District Court erroneously held that the decisions of this Court in *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982), and *White* v. *Weiser*, 412 U.S. 783 (1973), require this result. The District Court did not construe its mission to provide an effective remedy for the dilution of the objected-to plan, but rather to implement the same discriminatory racial policies which had been rejected by the Attorney General.

---

[7] Ex. P-1, p. 5, ¶ 16. See *Mississippi* v. *United States*, 490 F.Supp. 569, 575 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980). All references to exhibits are exhibits admitted in evidence in the District Court.

The proper scope of *Upham* is a critical issue which is likely to recur and which should be resolved by this Court. In a recent decision, a three-judge District Court, citing *Upham*, ordered into effect an Alabama legislative reapportionment plan to which the Attorney General had entered a preliminary Section 5 objection. *Burton* v. *Hobbie*, Civil No. 81-617-N (M.D. Ala. June 21, 1982). The action of the District Court here in ordering into effect a 53.77% black district should also be contrasted with the recent decision of the District Court for the District of Columbia denying preclearance of a legislatively-enacted Georgia congressional redistricting plan with a 57.28% black congressional district for racially discriminatory motivation. *Busbee* v. *Smith*, Civil No. 82-0665 (D.D.C. July 22, 1982).

If the District Court's decision is allowed to stand, minority voters whose voting strength is diluted in a legislatively-enacted plan will be left without an effective judicial remedy for the discriminatory state racial policy which precipitated the Attorney General's Section 5 objection.

I. THE DISTRICT COURT'S DETERMINATION TO IMPLEMENT A COURT-ORDERED PLAN WHICH EMBODIES THE RACIAL POLICIES OF THE OBJECTED-TO PLAN IS CLEARLY ERRONEOUS AND VIOLATES CONTROLLING PRECEDENTS OF THIS COURT.

A. The District Court's Decision to Adopt the Racial Policies of the Objected-To Plan Is Not Compelled by *Upham* v. *Seamon*, and Is Contrary to this Court's Rulings in *Upham*, *McDaniel* v. *Sanchez*, and *White* v. *Weiser*.

The District Court's decision to implement the Simpson plan was grounded upon its reading of *Upham* v. *Seamon*:

> We are guided by the Supreme Court's recent decision in *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982). In *Upham*, the Court clearly held that,

> in fashioning an interim reapportionment order, a district court must adhere to the state's political policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act. See also, *White* v. *Weiser*, 412 U.S. 783, 795, 37 L.Ed.2d 335, 346 (1973).

Mem. Op., pp. 11a-12a.

Both the Kirksey plans and the Simpson plan equalized the population among the districts by deviations of less than 0.2%, and preserved the incumbent congressmen in their respective districts. The District Court's ruling therefore turns primarily upon its determination that under *Upham* it was bound to follow Mississippi's racial policy embodied in S.B. 2001 of "establishment of two districts with 40% or better black population." *Id.* at 12a.

> However, we are bound by the legislative preference for two high black impact districts unless that determination violates constitutional or statutory mandates. We emphasize that it is not our function to substitute our judgment for the state's political program in this respect, absent federal invalidity. We find no federal bar to this aspect of the state's political objective.

Id. at 12a-13a.

The circumstances of *Upham* v. *Seamon* are strikingly different from those presented here. In *Upham*, the Attorney General objected to the district lines for two contiguous South Texas districts. Despite the fact that the Attorney General specifically approved the Voting Rights Act validity of the other 25 districts, the District Court redrew the boundary lines for four Dallas districts, which had been precleared by the Attorney General. This Court accepted the argument of the state that

> in the absence of any objection to the Dallas districts by the Attorney General, and in the absence of any finding of a constitutional or statutory violation with

> respect to those districts, a court must defer to the legislative judgments the plans reflect . . .

71 L.Ed.2d at 729.

But *Upham* also indicates that judicial deference to state reapportionment policy is limited by "the substantive constitutional and statutory standards to which state plans are subject," *id.* at 730, and any remedy "must be determined on the basis of the substantive legal standards applicable to the state's submission," *id.* at 731.

Indeed, the action taken by the District Court here directly contradicts the relief to remedy the Section 5 objection granted by the District Court in *Upham, Seamon* v. *Upham*, 536 F. Supp. 931 (E.D. Tex. 1982) (three-judge court), implicitly approved by this Court. In *Upham*, the Attorney General objected to the overconcentration of Mexican-Americans in one South Texas district, District 15, which was 80.4% Mexican-American, and which diluted Mexican-American voting strength in the adjoining new district, District 27, which was only 52.9% Mexican-American.[8] All three judges of the District Court agreed that it was "entirely appropriate for this Court to remedy, temporarily, those areas found objectionable under the Voting Rights Act so that congressional elections in Texas can proceed on schedule. 536 F. Supp. at 1028 (Parker, J., concurring in part and dissenting in part). The remedial plan ordered into effect by the District Court made District 15 72.2% Mexican-American and District 27 64.3% Mexican-American. *Id.* at 955. The District Court did not perceive the creation of two districts with substantial Mexican-American majorities as an unjustified "failure to defer to the State's choice" because it addressed "substantially the same problem that prompted the Attorney General of the

[8] Section 5 objection letter from William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to David Dean, Texas Secretary of State, January 29, 1982, p. 2.

United States to interpose an objection to S.B. 1." *Id.* at 958 n. 41 (Johnson, J.).

On appeal, the District Court's plan redrawing these South Texas districts to remedy the dilution of the objected-to plan was not contested by appellants, and this portion of the District Court's plan was implicitly approved by this Court as "required by the nature and scope of the violation." 71 L.Ed.2d at 730.

Here, contrary to the proper action of the *Upham* court, the District Court felt compelled by this Court's *Upham* decision to embrace the very legislative policy of diluting black voting strength in majority white, 40% black districts which resulted in the Attorney General's Section 5 objection. The statistics contained in the court's opinion itself make clear that the basis of the Attorney General's objection was the state's policy of fragmenting and diluting the black population concentration in the Delta area to create five majority white congressional districts in which blacks constituted no more than 47.95% of the population. Mem. Op., pp. 6a-7a. District 2, which employed this 40% standard, was specifically cited in the objection letter. Appendix B, p. 28a.

The state's policy of avoiding the creation of a significantly majority black congressional district and diluting black voting strength to create districts "with 40% or better black population" therefore was part of "the nature and scope of the violation," *Upham*, 71 L.Ed.2d at 730, which the District Court was required to remedy, not defer to. In contrast to *Upham* which turned on the *absence* of any objection as the foundation for court deference, the District Court in this case cites *Upham* to ordain deference to the legislative policies which *precipitated* the Section 5 objection.

The controlling precedents of this Court—including *Upham*—clearly prohibit District Courts from implementing a court-ordered plan which embodies the legislative

racial policies underlying the districting which the Attorney General has determined violates the Voting Rights Act. As this Court held in *McDaniel* v. *Sanchez*, 452 U.S. 130, 153 (1981):

> [W]henever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable. [Footnote omitted.]

In *McDaniel* this Court noted that in extending the Voting Rights Act, Congress intended that District Courts be governed by the administrative determinations of the Attorney General:

> Furthermore, in fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases.

S. Rep. No. 94-295, 94th Cong., 1st Sess. 17-18 (1975) (footnote omitted), quoted 452 U.S. at 149. The decisions of this Court make clear that the District Court is under no obligation to follow state policies found to be violative of constitutional or statutory guarantees:

> Of course, the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge. The District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified.

White v. *Weiser*, 412 U.S. 783, 797 (1973).

The interposition of the Attorney General's objection to S. B. 2001 and the racial policies embodied in that plan define the substantive Voting Rights Act standard which necessarily governs the Mississippi District Court's

deliberations unless and until Mississippi demonstrates the absence of both discriminatory purpose and effect in the District of Columbia District Court. *City of Rome* v. *United States*, 446 U.S. 156 (1980). Thus, the District Court lacked authority to promulgate an interim plan which was based upon deference to the core of the legislative decision which was found to be unlawful under Section 5.

If the District Court's decision is allowed to stand, the protections of the Voting Rights Act could be rendered meaningless. Any covered state which has violated Section 5 by enacting a discriminatory plan to which an objection has been interposed would be free to implement its discriminatory state racial policies by means of court deference to them in fashioning a court-ordered plan. Minority voters, who are the victims of such discriminatory action, would be without an effective remedy for discrimination against them.

Because the District Court's selection of the Simpson plan was based on its finding that it more nearly satisfied the state's criterion of creating two 40% or better black districts, the District Court's order should be vacated and the case remanded to the District Court for the formulation of a remedy for the Section 5 violation in this case.

B. Under the Section 5 Preclearance Procedures of the Voting Rights Act, the District Court Was Without Jurisdiction to Consider the Validity of and Approve the State's Racial Policies Embodied in S.B. 2001.

As part of its basis for implementing the Simpson plan, the District Court considered the validity of Mississippi's majority white, 40% black rule embodied in S.B. 2001, recited the testimony given by the chairman of the Legislature's Joint Congressional Redistricting Committee that the policy was not malevolent, but benign (Mem. Op., p. 12a), and concluded that "the state's

policy of favoring 40% or better black population districts was legitimate" (*id.* at 14a).[9]

This determination is contrary to the Attorney General's objection to S.B. 2001 and to the history of congressional redistricting in Mississippi, *infra*, Section C. But, in any event, the Voting Rights Act decisions of this Court firmly establish that the validity of the racial policies behind S.B. 2001 is not for the District Court in Mississippi to determine, absent Section 5 preclearance. As this Court recently ruled:

> We held only last term that § 5 applies to any change "reflecting the policy choices of the elected representatives of the people," . . .

Hathorn v. *Lovorn*, —— U.S. ——, 50 U.S.L.W. 4664, 4667 n. 16 (1982), quoting *McDaniel* v. *Sanchez*, *supra*, 452 U.S. at 153. The policy determinations of Congress in enacting the Act "reflect a congressional choice in favor of specialized review—either by the Attorney General of the United States or by the United States District Court for the District of Columbia." *McDaniel* v. *Sanchez*, 452 U.S. at 151. Any consideration by the Mississippi District Court of the validity of the state's racial redistricting policy contradicts the rule firmly established in the Mississippi cases that under the Voting Rights Act the validity of such considerations is expressly "reserved by

---

[9] The District Court's findings on this issue ignore the fact that spreading black voters around among two or more districts so that blacks constitute only 40% or more of the district population is the hallmark of racial gerrymandering. See Section C, *infra*. In endorsing the legislature's racial theory of legislative redistricting, the District Court failed to take into account the stipulated proof of racially polarized voting, under which majority white districts with 40% black minorities are racially discriminatory against black voters. "Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections because of their race." *Rogers* v. *Lodge*, 50 U.S.L.W. 5041, 5044 (U.S. July 1, 1982).

§ 5 for consideration by the Attorney General of the United States or the District Court for the District of Columbia." *Perkins* v. *Matthews*, 400 U.S. 379, 386 (1971). See also, *Connor* v. *Finch*, 431 U.S. 407, 412 (1977); *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Allen* v. *State Board of Elections*, 393 U.S. 544, 561 (1969).

C. Alternatively, the District Court Erred in Approving the State's Racial Policy of Creating Majority White, 40% Black Districts and Implementing that Policy in the Simpson Plan Because that Policy Is Rooted in Purposeful Racial Discrimination.

In placing its imprimatur upon Mississippi's policy of creating majority white, 40% black "high impact" congressional districts, the District Court disregarded the Attorney General's findings and the uncontradicted documented legislative history in the record below which showed that this policy was "rooted in racial discrimination" and was the product of "a long 'history' of bias and franchise dilution in the State's traditional drawing of district lines." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n. 3 (1972).

The stipulated and undisputed facts show that from 1882 to 1966 Mississippi retained a congressional district which encompassed the heavily black, northwest portion of the state commonly referred to as "the Delta." Each time the state lost a congressional seat because of population shifts—in 1932, 1952, and 1962—the Delta district was kept intact. May 13-14 Hearing Transcript ("Tr."), 20-30; Exs. P-1, P-2, P-3 through 12.

In 1960 the Delta congressional district (District 3) was 65.51% black in population. Ex. P-13. In 1962, the Mississippi Legislature combined the Second District, which was 59.29% black in population and 52.09% black in voting age population. *Id.* The 1962 plan, however,

was grossly malapportioned. Ex. P-1. During this period blacks were prevented from exercising any political power in congressional elections because of the state's

> long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which the registration statistics . . . would seem to show had been remarkably successful.

United States v. *Mississippi*, 380 U.S. 128, 135-36 (1965).

In 1965 Congress enacted the Voting Rights Act, and just as blacks were starting to register and vote, the Mississippi Legislature in 1966 redrew the congressional district lines. Tr. 30-32. The heavily-black Delta, a distinct geopolitical entity since 1882, was carved up among four of the five congressional districts, all of which were majority white in voting age population. Ex. P-2, Ex. P-13A. This was the point at which Mississippi instituted its majority white, 40% black congressional redistricting policy. Three of the districts were in the 40% or better range, and one district was 51.35% black in population, but 44.32% black in voting age population. Ex. P-13A.

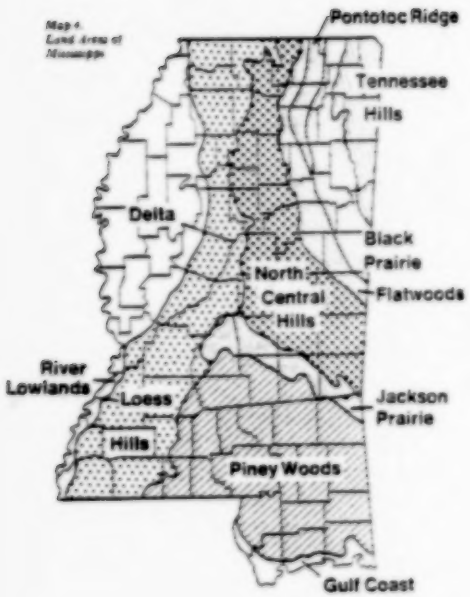
Newspaper accounts of the legislative debate at the time, the only available source of legislative history,[10] indicate that race was the main issue in the legislative debate, and that the district realignment was racially motivated to fragment and dilute black voting strength:

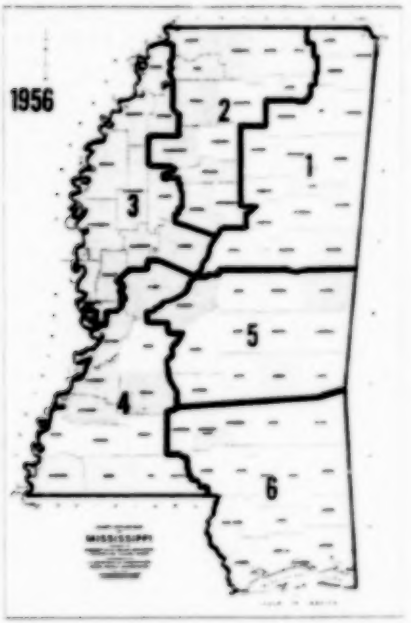
> Rep. Thompson McClellan of Clay charged in the House the districts were set up "so there shall not be a majority of certain groups in a district. The courts will consider a similar case and they'll throw this out. We will have congressmen elected at-large or by districts fixed by the U.S. Supreme Court."

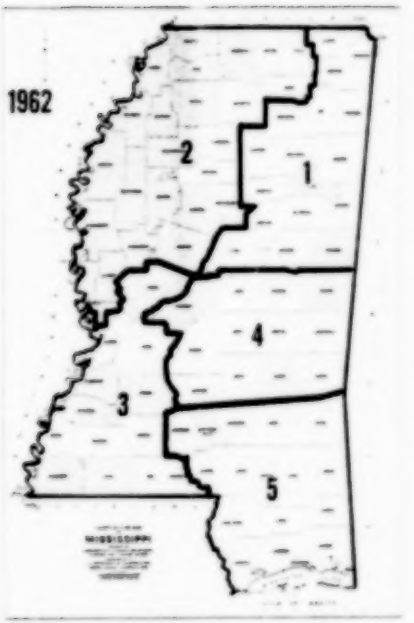
---

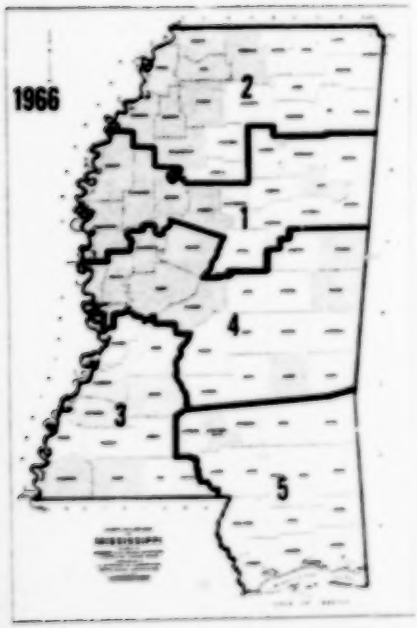
[10] Mississippi has stipulated that, because there is no official legislative record, these newspaper reports are admissible in evidence to show legislative history, and they were admitted in evidence below. Ex. C-1, p. 8.

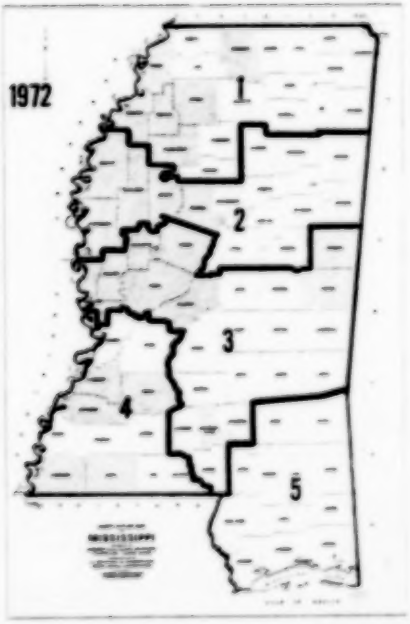
MISSISSIPPI CONGRESSIONAL DISTRICT LINES, 1956 TO 1981

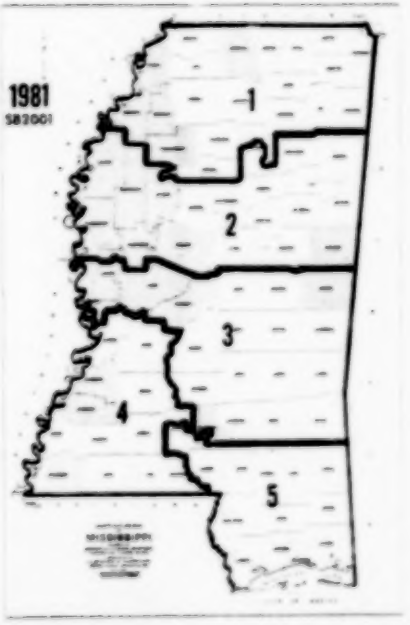












(MAJORITY BLACK COUNTIES SHADED)

MISSISSIPPI CONGRESSIONAL DISTRICTS—1960 to 1981
(Exs. P-13, 13A).

A. 1956 PLAN—1960 CENSUS

District	Total	Black	(%)
1	364,963	117,663	(32.23%)
2	237,879	118,049	(49.62%)
3	370,554	242,759	(65.51%)
4	459,186	138,690	(30.20%)
5	295,072	121,540	(41.18%)
6	451,565	107,039	(23.70%)

B. 1962 PLAN—1960 CENSUS

District	Total	Black	(%)	Black VAP	(%)
1	364,963	117,663	(32.24%)	53,810	(25.89%)
2	608,441	360,780	(59.29%)	159,432	(52.09%)
3	460,100	213,573	(46.41%)	101,790	(40.55%)
4	295,072	121,540	(41.19%)	64,550	(39.40%)
5	449,565	106,652	(23.72%)	50,330	(20.54%)

C. 1966 PLAN—1960 CENSUS

District	Total	Black	(%)	Black VAP	(%)
1	449,361	230,797	(51.36%)	103,710	(44.32%)
2	427,468	184,424	(43.14%)	82,198	(34.72%)
3	428,447	194,782	(45.46%)	93,071	(39.65%)
4	423,300	203,553	(48.09%)	100,603	(44.13%)
5	449,565	106,652	(23.72%)	55,330	(20.54%)

D. 1972 PLAN—1970 CENSUS

District	Total	Black	(%)	Black VAP	(%)
1	433,825	154,085	(35.51%)	69,782	(28.59%)
2	440,689	202,428	(45.93%)	94,366	(40.99%)
3	445,723	179,936	(40.36%)	85,644	(33.77%)
4	444,776	191,739	(43.11%)	92,260	(36.75%)
5	451,981	87,582	(19.38%)	41,091	(16.19%)

E. 1981 PLAN—1980 CENSUS—S.B. 2001

District	Total	Black	(%)
1	504,107	150,195	(29.79%)
2	504,024	241,668	(47.95%)
3	504,237	168,336	(33.38%)
4	504,123	228,491	(45.32%)
5	504,147	98,516	(19.54%)

> "This patently was drawn in a manner to devalue the vote of a certain group of people."
>
> Legislators frequently refrain from using the word "Negro," and refer to Negroes as "a certain group."
>
> And Rep. Odie Trenor of Chichasaw also charged the bill was an effort to split up the Negro vote and termed the bill a gerrymander attempt.

Jackson *Clarion-Ledger*, Jan. 19, 1966 (Ex. P-1, Attachment F-7).

> An issue proponents had hoped to keep "under wraps" to shelter the far-reaching aspects of the bill was opened up on the floor by two opponents. It was the obvious five-way split of the Negro population to minimize its influence at the polls. Although that was an obvious purpose in the realignment of the counties in the Williams bill proponents had sought to keep it from arising on the floor. They realize once it was brought into the open it would provide the arguments desired by those reportedly planning to challenge it before the United States Supreme Court.

Memphis *Commercial Appeal*, Jan. 16, 1966 (Ex. P-1, Attachment F-6).

All five districts of the House-passed bill were majority white in population. NAACP Field Secretary Charles Evers described the bill as "discriminatory and obviously designed to gerrymander districts to split up Negro voting strength." Jackson *Clarion-Ledger*, Jan. 19, 1966 (Ex. P-1, Attachment F-7).

The Mississippi Senate, fearing the House-passed bill would not stand up in court, passed a bill which split up the Delta, but which contained one district with a slight 55-56% black population majority. Ex. P-1, p. 11, ¶ 43. The House refused to accept the Senate bill, and instead, enacted a Senate-rejected plan, which created five majority white districts. *Jackson Daily News*, April 7,

1966 (Ex. P-1, Attachment F-15). The House-Senate conference committee was deadlocked for several weeks. Ex. P-1, pp. 12-14. Finally, one day before the qualifying deadline, both houses passed a compromise plan which contained one 51.36% black majority district, but it too was described as racially discriminatory.

> Another amendment was offered by Rep. Thompson McClellan of Clay, who argued that the new House plan could not stand up in court.
>
> "Any bill that shows discrimination against a certain race," he said, "they'll knock down. You are trying to take two white counties in northeast Mississippi out of the 2nd District, and put a heavy Negro populated county in. They will say this bill is fraught with discrimination."
>
> But he, too, lost.

Jackson Daily News, April 7, 1966 (Ex. P-1, Attachment F-15).

The 1966 plan was never submitted for Section 5 review. Ex. C-1, pp. 5-6.[11]

In 1972 the Mississippi Legislature enacted a new congressional redistricting plan based on the 1966 plan; only five counties were realigned. Ex. P-2; Tr. 32-33. The 1972 plan also divided the heavily black Delta area among four of the five districts, and this time all five districts were majority white in both population and vot-

---

[11] In 1966 a Mississippi District Court held that a group of black voters failed to sustain their burden of proving that the congressional redistricting plan was racially motivated, holding only that "the solemn acts of the Congress or of State legislatures may not be impeached or invalidated on nothing more than newspaper reports." *Connor* v. *Johnson*, 279 F. Supp. 619, 623-24 (S.D. Miss. 1966) (three-judge court), *aff'd mem.*, 386 U.S. 483 (1967). The District Court did not determine, however, that the 1966 plan did not have a discriminatory effect, and did not apply the Section 5 standard under which the state would have had the burden of proving that the 1966 plan was not racially discriminatory in purpose or effect.

ing age population. Ex. P-13A. Three of the districts (Districts 2, 3, and 4) were between 40% and 46% black. *Id.* All efforts to restore a Delta district were defeated, and the 1972 plan was denounced in the Mississippi Legislature as an extension of the "racially motivated" 1966 plan designed to dilute black votes.

> Rep. Robert Clark of Ebenezer, the lone black member of the legislature, charged the plan was simply an extension of a present congressional plan which was "racially motivated" and designed to "dilute" black votes.
>
> Clark was referring to the present alignment of congressional districts.
>
> An alternative plan was offered by Clark to sharply revise the five districts, but it was rejected 102-7. Several other amendments also were defeated.

Tupelo Daily Journal, February 18, 1972 (UPI wire story) Ex. C-1, Binder 6, Attachment Y). Other legislators denounced the new district lines as "outlandishly drawn," "an outrageous outline," and "a monster." Jackson *Clarion-Ledger*, Feb. 18, 1972 (*id.*). On the Senate floor, Sen. Ebb Horton stated that "this House plan makes the Third District look like an old duck with its foot turned backwards." Jackson *Clarion-Ledger*, Feb. 24, 1972 (*id.*). Amendments to restore a Delta district which had population variances lower than the enacted plan were defeated in the Senate.

> Much opposition to these plans centered upon the provision for a "Delta" district. Many counties in that area had top-heavy black majorities.

Id. The 1972 plan was submitted to the Justice Department, and no objection was interposed. The Attorney General determined in his 1982 objection letter:

> However, the Attorney General's decision was, as expressly stated in the 1972 no objection letter, not

> based on an independent review of the merits of the plan under Section 5, but rather, rested solely on the view held at that time that the decision in *Connor v. Johnson*, *supra*, was binding on the Attorney General.

Appendix B. p. 26a.

During the public hearings on S.B. 2001, the 1981 plan, the Mississippi NAACP, all 17 black members of the Mississippi Legislature, and all of the black witnesses who testified at the eight public hearings held throughout the state testified in favor of a majority black congressional district. Tr. 239-40. All proposals to create a congressional district with a substantial black majority were defeated. Ex. P-1, p. 25; Ex. C-1, Binder 2. The chairman of the Legislature's Joint Congressional Redistricting Committee testified at the trial in this case that the Mississippi Legislature made a conscious decision not to create a majority black district because "it would serve the narrow political interest of a small group of black politi .ans." Tr. 238-39.

On the basis of this evidence, which was disregarded by the District Court in its decision, the District Court erred in approving and implementing Mississippi's policy of creating majority white, 40% black congressional districts.

II. THE DISTRICT COURT-ORDERED PLAN VIOLATES THE GUIDELINES ESTABLISHED BY THIS COURT IN *CONNOR* v. *FINCH* AND FAILS TO REMEDY BLACK VOTE DILUTION.

In *Connor* v. *Finch*, 431 U.S. 407 (1977), the Mississippi legislative reapportionment case, the Court held that the District Court's task in devising a court-ordered plan

> is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner "free from any taint of arbitrariness or discrimination."

431 U.S. at 415, quoting *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964). In particular, the District Court must take care to avoid "challenges based upon claims that the plan's apportionment of some districts impermissibly dilutes Negro voting strength." *Id.* at 421.

The Court specifically identified two types of dilution of black voting strength to be avoided in court-ordered plans, both of which typify the salient characteristics of racial gerrymandering. In the first, the Court criticized the fragmentation of black voting strength through "five oddly shaped beats that extend from the far corners of the county in long corridors that fragment the city of Jackson, where much of the Negro population is concentrated." *Id.* at 423. This was the gerrymandering technique employed by the Mississippi legislature in the plan objected to by the Attorney General.

But the court also identified a second, equally invidious form of racial gerrymandering which combined black population concentrations with more populous white concentrations to create districts with white voting majorities. *Id.* at 424-25.[12] The Court criticized the District

---

[12] In *Mississippi* v. *United States*, 490 F. Supp. 569, 581-82 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980), the District Court held:

> 14. In a single-member districting plan, black voting strength may be unconstitutionally and impermissibly diluted, minimized, and cancelled out (1) when heavy black population concentrations are unnecessarily fragmented and dispersed, and (2) when black population concentrations [are unnecessarily combined with white population concentrations] to deny black voters the opportunity to elect candidates of their choice. *Connor* v. *Finch*, 431 U.S. 407, 421-25 (1977); *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 149 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Robinson* v. *Commissioners Court, Anderson County, Texas*, 505 F.2d 674, 679 (5th Cir. 1974); *Moore* v. *Leflore County Board of Election Commissioners*, 502 F.2d 621, 622-24 (5th Cir. 1974); *Sims* v. *Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965) (three-judge court).

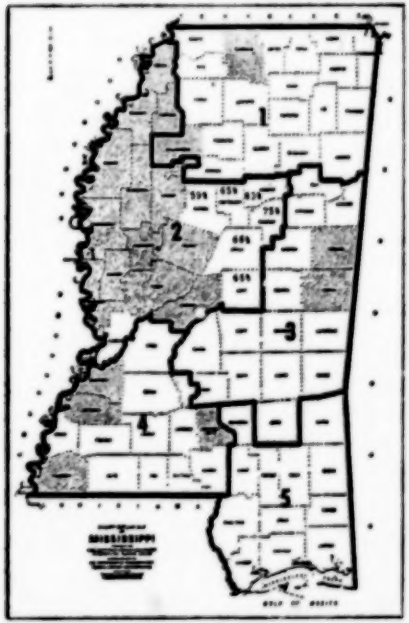
Court plan which combined black population concentrations in two contiguous, majority black counties, Jefferson and Claiborne counties, with adjoining majority white counties and parts of counties "to make a white majority senatorial district" and "an irregularly shaped senatorial district with a slight Negro voting-age majority" in the face of a proposed alternative which would have kept the black population concentration intact and would have made a compact district with a 55% Negro voting age population majority. *Id.*

In adopting the Simpson plan, the District Court here rejected the clear mandate of *Connor* v. *Finch*. While the court-ordered plan reunites the Delta counties, District 2 unnecessarily reaches from the Mississippi River all the way across to the east-central portion of the state, and links the heavily black Delta area with the six predominantly-white, Hill counties of Attala, Carroll, Choctaw, Leake, Montgomery, and Webster, which, taken together, are 65% white.[13] The resulting district is 53.77% black in population, Mem. Op., p. 8a, but majority white in voting age population (*supra*, p. 7). By running the lines of District 2 horizontally in an east-west direction, the Simpson plan retains one of the prime features of the objected-to plan. Appendix B, Section 5 objection let-

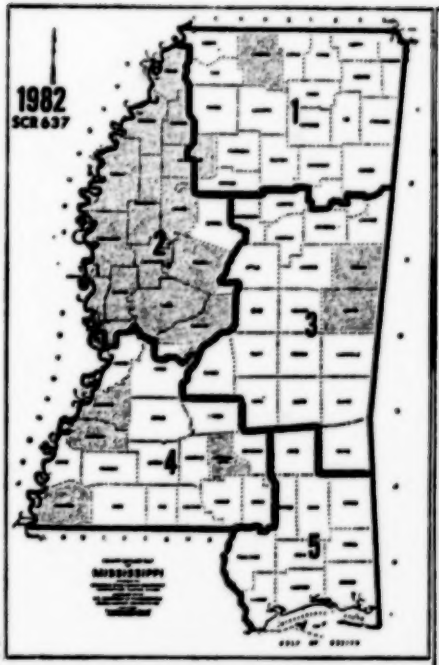
---

[13] MAJORITY WHITE HILL COUNTIES JOINED TO DELTA DISTRICT IN SIMPSON PLAN

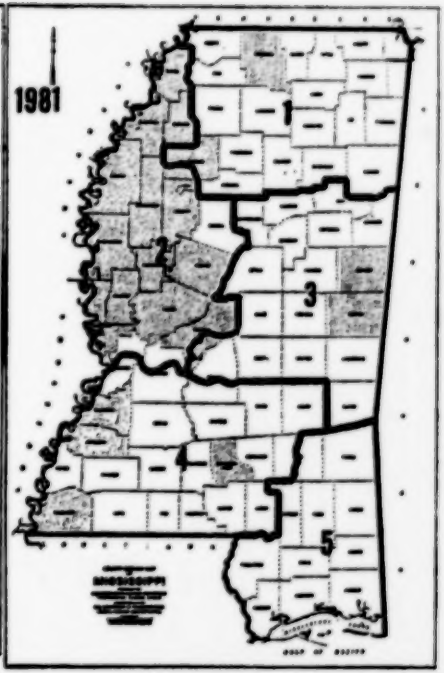
County	Total Population	White Population	% White Population	% White VAP
Attala	19,865	12,052	60.67%	65.79%
Carroll	9,776	5,332	54.54%	59.43%
Choctaw	8,996	6,447	71.67%	75.36%
Leake	18,790	12,989	60.96%	65.79%
Montgomery	13,366	7,883	58.98%	64.57%
Webster	10,300	8,265	80.24%	83.07%
	81,093	52,968	65.32%	



Map showing boundaries of Simpson plan adopted by the District Court. Majority black counties (1980 Census) are shaded. Percentages are white voting age population percentages (1980 Census).



Brooks Plaintiffs' Plan
(Kirksey, 1982)



Brooks Plaintiffs' Alternative
(Kirksey, 1981)

ter, p. 27a. This district also has a large land area of 11,915 square miles (Tr. 269), impeding effective campaigning.

Plaintiffs' expert witness at trial testified (Tr. 272), and the District Court did not find otherwise, that the Simpson plan denies black voters the opportunity to elect candidates of their choice in any of the five districts. By combining these heavily white Hill counties with the majority black Delta counties, this plan dilutes black voting strength just as the *Connor* v. *Finch* court-ordered plan diluted black voting strength in Jefferson and Claiborne counties by combining them with adjacent majority white areas.

The two Kirksey plans, by contrast, avoid this dilution of black voting strength by combining the majority black Delta counties with adjacent majority black areas of Hinds County and Jackson, forming majority black districts which are 64.37% black and 65.81% black, respectively. Mem. Op., pp. 7a-8a. The attached maps show that the Kirksey plan districts are more compact and regular in shape, particularly in the preferred plan, than the Simpson plan districts. District 2 in the Kirksey preferred plan is compact and has a land area of only 9,361 square miles (Tr. 269). The expert testimony at trial was that District 2 in each of the Kirksey plans would give black voters an opportunity to elect candidates of their choice (Tr. 270).

Given the District Court's holding that "the essence of the dispute centers around claims of dilution of black voting strength," Mem. Op., p. 7a, the lower court failed adequately to explain why it preferred a plan which denied black voters an opportunity to elect candidates of their choice over one which did. Certainly, the District Court's determination was governed by its misconception that it was bound by the state's policy in favor of majority white, 40% black districts. But the District Court also labored under the legally erroneous misconception

that its remedial authority to correct the statutory violation in this case precluded approval of a 65% majority black district, and that any plan which contained such a district was a racial gerrymander. Mem. Op., p. 14a. This view is totally inconsistent with this Court's decision in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), in which the Court recognized the "congressional decision to authorize the use of race-oriented remedies" to counter the effects of vote dilution following a Section 5 objection. *Id.* at 176 (Brennan, J., concurring). There the Court specifically approved the creation of a 65% black majority district to give minority voters an opportunity to participate on an equal basis in the electoral process. *Id.* at 164-67 (plurality opinion).[14]

Here, the creation of a 65% black district constitutes "a reasoned response to the problem of past discrimination." *Id.* at 184 (Burger, C.J., dissenting). As the Attorney General noted in his objection letter, Mississippi had a 65% black majority Delta district prior to the passage of the Voting Rights Act. Subsequent congressional redistrictings were designed to eliminate that 65% black district, and this gerrymandering, the evidence shows, was the direct product of purposeful racial discrimination. The Attorney General in his objection letter selected the pre-Act 65% district as the benchmark by which the retrogression of black voting strength prohibited by the Voting Rights Act, *Beer* v. *United States*, 425 U.S. 130 (1976), is to be measured, and the District Court in implementing a remedial plan is bound by that determination. *McDaniel* v. *Sanchez, supra.*

The District Court also criticized the Kirksey plans as

> repugnant to valid state policies inasmuch as they erode the electoral bases of incumbent congressmen in Districts 2 and 4, contain a larger population

---

[14] See also, *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 151 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977).

> variance than the Simpson amendment, and disregard the state's policy of creating two high black impact districts.

Mem. Op., p. 14a. The criticisms are insubstantial and should be rejected. The Kirksey plan districts generally encompass the same geographical areas as the Simpson plan districts. Further, both Kirksey plans satisfy the state's policy (Mem. Op., p. 6a) by preserving incumbent congressmen in their respective districts (Tr. 47). This Court has ruled that preserving the reelection changes of incumbents is a valid criterion only if pursuit of that goal is not tainted with unlawful discrimination, *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), which the Simpson plan is. No incumbent has a federal right to be reelected. See, e.g., *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452, 456 (E.D. La. 1971) ("those elected to office for specific terms do not thereby acquire a vested interest in the office. . . . The office holder has no constitutional right to represent anyone except for the specific term for which he is elected."). Further, there is no significant difference in the population deviations of the Kirksey plans (0.2150% and 0.230%) and the Simpson plan (0.2141%). See *Karcher* v. *Daggett*, 50 U.S.L.W. 3767 (U.S. March 15, 1982) (Brennan, J., in chambers). The last criticism regarding the "black impact" districts is legally insufficient, *supra*, Sections B, C.[15]

In selecting the Simpson plan, the District Court violated the mandate of this Court expressed in *Connor* v. *Finch* "to make every effort not only to comply with

---

[15] The District Court also stated that it preferred the Simpson plan because it split only two sparsely settled counties, and maintained District 2 as a rural area. Mem. Op., pp. 15a-16a. The chairman of the Joint Committee admitted that combining urban and rural areas in congressional districts was unavoidable and was part of S.B. 2001, the legislatively-enacted plan, Tr. 243; S.B. 2001 itself divided four counties. The preference for intact counties is therefore not a compelling state policy, nor is it a sufficient criterion for court preference for the Simpson plan.

established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges." 431 U.S. at 425. This furnishes a separate and independent ground for vacating the District Court's selection of that plan. It is therefore appropriate for this Court to provide the District Court with guidance in the formulation of a remedy to avoid new claims for impermissible racial vote dilution. Cf. *Connor* v. *Finch*, 431 U.S. at 422; *Chapman* v. *Meier*, 420 U.S. 1, 26 (1975).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

WILLIAM L. ROBINSON
*FRANK R. PARKER
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

ROBERT BRUCE MCDUFF
RATNER & SUGARMON
Suite 525
Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

Attorneys for Appellants [16]

*Counsel of Record

---

[16] Appellants gratefully acknowledge the valuable assistance of Samuel Issacharoff, a student at Yale Law School, in the preparation of this Jurisdictional Statement.

APPENDIX A

District Court Decision and Order

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

No. GC 82-80-WK-O

DAVID JORDAN and SAMMIE CHESTNUT, On Behalf of the Greenwood Voters Leage, Individually and on Behalf of others similarly situated,

Plaintiffs

v.

WILLIAM WINTER, Governor of Mississippi; T. H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J. C. "CON" MALONEY, Secretary, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives,

Defendants

No. GC 82-81-WK-O

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of all others similarly situated,

Plaintiffs

v.

WILLIAM F. WINTER, Governor of Mississippi, WILLIAM A. "BILL" ALLAIN, Attorney General of Mississippi, EDWIN LLOYD PITTMAN, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants

(June 8, 1982)

Before CLARK, Circuit Judge, and KEADY and SENTER, District Judges.

PER CURIAM:

Plaintiffs bring class actions on behalf of Mississippi residents and registered voters and the state's black residents and voters to (1) enjoin enforcement of the state's 1981 congressional redistricting plan until it is precleared under § 5 of the Voting Rights Act (42 USC § 1973c); (2) prohibit further use of Miss. Code Ann. § 23-5-223 (1972), the state's existing congressional plan, because of population malapportionment allegedly violative of Art. 1, § 2 and the fourteenth amendment to the United States Constitution; and (3) secure a court-ordered plan for the 1982 elections for members of the United States House of Representatives, and thereafter until changed by law. Defendants are the state's governor, attorney general, secretary of state, state board of election commissioners and the Republican and Democratic state executive committees which are responsible for conducting the primary and general elections for the United States House of Representatives in Mississippi.

The court has jurisdiction pursuant to 28 USC §§ 1331 and 1343 and 42 USC § 1973j(f), and a three-judge district court has been properly convened pursuant to 28 USC § 2284.

In August 1981 the Mississippi Legislature enacted S. B. 2001, also known as 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8, for redistricting the state's five congressional districts and thereafter submitted it to the Attorney General of the United States for § 5 preclearance. After requesting additional information, the Attorney General interposed timely objection on March 30, 1982. Although the state legislature was in session when the objection was received, it adjourned several days later

without enacting another plan or further attempting to obtain preclearance from the Attorney General. Instead, on April 7, the state filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking judicial preclearance of S. B. 2001. Mississippi v. Smith, No. 82-0956. This court has been notified that the declaratory judgment action, in which plaintiffs have intervened, will not be heard until mid-July. Since by Mississippi law, the 1982 congressional primaries were set for June 1 with runoff primary June 22, this court on April 26 found it necessary to order indefinite postponement of the current year's congressional primary pending expedited hearing on issues relevant to formulation of an interim court-ordered plan.

The parties are in agreement that the present circumstances require the court to adopt an interim redistricting plan effective until S. B. 2001 is precleared or an alternate plan is enacted by the state legislature and precleared under § 5. Admittedly, Mississippi is a covered jurisdiction under § 5 of the Voting Rights Act, and S. B. 2001 is a change in standards, practices or procedures with respect to voting within the meaning of § 5. The parties, however, vigorously disagree on what plan should be adopted by the court as an interim congressional redistricting plan.

During a two-day hearing on May 13 and 14, the court received stipulations, oral and documentary evidence and heard oral argument. Briefs of all concerned parties having been filed, we incorporate herein findings of fact and conclusions of law required by Rule 52(a), F. R. Civ. P.

I.

According to the 1980 official census, Mississippi has a total population of 2,520,638, of which approximately 35% are black. Since the state elects five members of the United States House of Representatives, the norm, or ideal population size for a congressional district is 504,-

128. Because of notable population shifts that have occurred throughout the state since 1970, the districts formed by the existing 1972 plan have a total population variance of 17.6%. The following table reflects the 1980 population, existing extent and percent of deviation, and percentage of minorities in the five 1972 districts:

Dist. No.	Total Pop.	Deviation	% Deviation	Black %
1	495,709	8,419	−1.67	29.90
2	460,780	43,348	−8.60	45.25
3	514,218	10,090	+2.00	37.87
4	500,329	3,799	−0.75	45.37
5	549,602	45,474	+9.02	19.78

In recognition of this disparity, the legislature in 1980 established a joint Senate-House Committee for Congressional Redistricting (Joint Committee), chaired by Representative Thomas H. Campbell, III, which converted census population data into the state's election precincts, conducted eight public hearings around the state and received the views and proposals of interested groups and individuals. Included among the submitted proposals were a number of plans advocated by legislators and citizens of both races. The plans submitted by blacks proposed joining the black majority counties in the northwest portion of the state known as the "Delta area" to other territory to create a black majority district, ranging from 52.1% to 65.81%.[1]

---

[1] The Mississippi Delta consists of 19 Delta and part-Delta contiguous counties as follows: Bolivar, Carroll, Coahoma, DeSoto, Grenada, Holmes, Humphreys, Issaquena, Leflore, Panola, Quitman, Sharkey, Sunflower, Tallahatchie, Tate, Tunica, Warren, Washington, and Yazoo. This is a distinct geographical area of the state traditionally featuring an agricultural economy concerned with flood control of the Mississippi River. The geography of the Delta has been colorfully and somewhat accurately described as "beginning in the lobby of the Peabody Hotel at Memphis, Tennessee, and ending at Catfish Row in Vicksburg, Mississippi." Since early times,

The Joint Committee recognized that the population variances had to be eliminated, but a majority of its members concluded this could be satisfactorally accomplished without diluting black voting strength by rearranging district lines to avoid incumbent congressmen from running against each other and by transferring only six counties and portions of four counties across district lines. Although Mississippi's congressional districting plans from 1882 to 1966 had contained a district encompassing most of the Delta counties, the committee did not feel obligated to voluntarily create a black majority district with a configuration different from the 1972 lines that had been previously precleared.[2]

The record further reflects that the Joint Committee disapproved any major change of the district lines and recommended a plan, the essence of which was enacted by the legislature as S. B. 20001 [sic], which achieved a population variance of .0422 by splitting four counties into adjacent districts (K-27). The stipulated data as to the total population, deviation, percentage of deviation, and percentage of total minority population[3] in the S. B. 2001 districts follow:

---

concentrations of blacks have resided in the Delta area. In fact, of the 21 black majority counties in Mississippi, 14 are located in the Delta.

[2] In 1966, the legislature first adopted a plan dividing the north and north-central portions of the state by drawing east/west lines generally across the state which segmented black majority Delta counties into three districts. Civil rights plaintiffs' challenge of the plan as a racial gerrymander violative of the fifteenth amendment was turned down in Connor v. Johnson, 279 F. Supp. 619 (S.D. Miss. 1966), aff'd. 386 US 483, 18 L Ed 2d 224 (1967). The 1966 plan was in fact never submitted and precleared in accordance with § 5. In 1972, the legislature substantially reenacted the 1966 plan, adjusting only for population variances. On May 10, 1972, the Attorney General precleared the 1972 act, which was utilized without challenge for five congressional elections.

[3] Black voting age population is approximately 5% lower than total population figures.

District	Total Population	Deviation	% Deviation	Black %
1	504,107	− 21	−.0042	29.79
2	504,024	−104	−.0206	47.95
3	504,237	+109	+.0216	33.38
4	504,123	− 5	−.0010	45.32
5	504,147	+ 19	+.0038	19.54

S. B. 2001 was objected to by the Attorney General on the ground it divided the black majority Delta and part-Delta counties among Districts 1, 2 and 3 rather than concentrating them in a single district and concluded there had been unlawful dilution of minority voting strength.[4] The Attorney General was of the view that the legislature's reliance upon the 1972 precleared plan was misplaced, and stated that while no objection to the 1972 plan was timely interposed, this was the result of an er-

---

[4] The Attorney General's objection letter stated in part:

Our analysis shows that, according to 1980 Census data, the State is authorized five congressional districts and has a population which is 35.2 percent black. The black population in large part still is concentrated in the Delta region. District Nos. 1, 2 and 3 of the reapportionment plan have been drawn horizontally across the majority-black Delta area in such manner as to dismember the black population concentration and effectively dilute its voting strength.

Alternate proposals were presented to the reapportionment body which would have avoided the fragmentation and dilution of minority voting strength in the Delta area, and we have received complaints that such alternate proposals were rejected for racially discriminatory reasons. Our own review has revealed that, in fact, reasonable alternatives could be drawn which would avoid the fragmentation and dilution of minority voting strength in the Delta area and the State's submission offers no satisfactory explanation for, or governmental interest in, the rejection of such alternatives. The adoption of the east-west configuration of the proposed plan, instead of a configuration which recognizes the Delta as a community of interest, suggests to us an unnecessary retrogression in the position of black voters in Mississippi.

Accordingly, we are unable to conclude that the submitted plan meets the requirements of the Act in its treatment of the Delta area. I must, therefore, on behalf of the Attorney General, interpose an objection to Senate Bill No. 2001 pursuant to Section 5 of the Voting Rights Act of 1965.

roneous determination by his office that the Supreme Court's summary affirmance in Connor v. Johnson, 386 US 483, 18 L ed 2d 224 (1967), was entitled to deference as to the § 5 issues.

Since it is apparent that the population deviations in congressional districts can be easily alleviated, the essence of the dispute centers around claims of dilution of black voting strength. Plaintiffs urge the court to adopt an interim plan with one district containing approximately 65% black majority population. To achieve this purpose, they have submitted two proposals, both of which were devised by Senator Henry J. Kirksey, a black legislator. The primary Kirksey plan (K-30) has a 64.37% black majority district and a total population variance of .2150%. This plan splits five counties, including populous Hinds County, from which a portion of the City of Jackson is combined with 14 Delta and part-Delta counties or segments thereof and with additional counties to form the black majority district. The following table presents the data concerning this plan.

District	Total Population	Deviation	% Deviation	% Blacks
1	504,219	+ 92	+.0182	25.60
2	503,436	−691	−.1371	64.37
3	504,530	+403	+.0799	32.49
4	504,035	− 92	−.0182	33.83
5	504,418	+291	+.0577	19.75

The "fall-back" Kirksey plan (P. Ex. 15) urged by plaintiffs has a 65.81% black majority district and a total population variance of .230%; it splits five counties, including Hinds County, which is divided among three districts. The majority black district in this plan combines portions of the Cities of Jackson and Vicksburg with 15 Delta and part-Delta counties, or segments thereof. Pertinent data on the plan follow:

District	Total Population	Deviation	% Deviation	Black %
1	503,642	−486	−.096	25.72
2	504,926	+798	+.158	65.81
3	503,762	−366	−.072	30.36
4	504,261	+133	+.026	33.70
5	504,047	− 81	−.016	20.33

In addition to the two Kirksey plans, the Joint Committee had before it many other plans submitted by various legislators and citizens, including several plans developed by the committee staff on motion of Representative James C. Simpson, which resulted in a plan referred to as the "Simpson amendment" (K-26). This plan, urged by AFL-CIO, as amicus curiae, has a total deviation of .2141%, and contains a district (District 2) which combines 15 Delta and part-Delta counties with six eastern rural counties to produce a 53.77% black majority district. Another district (District 4) has a 45.25% black district. The Simpson amendment only splits two rural counties and received considerable support in a floor vote occuring in the state House of Representatives. Miss. House Journal, Extraordinary Sess. 1981, p. 30. This plan is depicted below.

District	Total Population	Deviation	% Deviation	Black %
1	504,671	+543	+.1077	25.86
2	504,697	+569	+.1128	53.77
3	503,760	−368	−.0729	31.23
4	503,893	−235	−.0466	45.25
5	503,617	−511	−.1013	19.84

Other plans considered but rejected by the legislature have not been urged for adoption by this court. The state officials, however, urge implementation as an interim plan of S. B. 2001, the existing 1972 redistricting plan, or a plan to be drawn by the court only slightly modifying either one of the preceding two.

II.

All parties agree that under § 5 and decisional precedent, this court serves only a limited function in congressional redistricting cases. Our task becomes an "unwelcome obligation" to prescribe an interim plan which will be effective merely until a redistricting plan adopted by the state can lawfully be used in its place, i.e., until either the District of Columbia court renders declaratory judgment upholding S. B. 2001 or the Mississippi legislature enacts another redistricting plan which is precleared under § 5. Moreover, notwithstanding a suggestion in McDaniel v. Sanchez, —— US ——, 68 L ed 2d 724, 739 (1981), that a federal district court should fashion its own plan, this court lacks the time, ability, and record basis to independently create a plan which could be implemented with sufficient promptness to allow the orderly conduct of the 1982 congressional primary and general elections. These limitations thus require us to choose from among the several plans urged for adoption in these proceedings. *Cf.* Terrazas v. Clements, —— F. Supp. ——, slip op. at 13-14 (N.D. Tex., March 24, 1982) (three-judge court).

Mississippi is precluded by the express terms of § 5 from implementing S. B. 2001 so long as it remains unprecleared. *See* Allen v. State Board of Elections, 393 US 544, 22 L ed 2d 1 (1969); Connor v. Waller, 421 US 656, 44 L ed 2d 486 (1975); Dotson v. City of Indianola, 521 F. Supp. 934 (N.D. Miss. 1981) (three-judge court). Section 5, however, does not by its terms prohibit a federal district court from utilizing, on an interim basis, an unprecleared plan. Indeed, it would be a rare case in which a federal court, compelled to devise an interim redistricting plan, would have opportunity to place into effect a plan that had been precleared under § 5. Although circumstances might arise in which a federal court could order, on an interim basis, implementation of an unprecleared legislative plan, we conclude that any action by

this court to so order S. B. 2001 into effect would be an injudicious exercise of our equitable remedial power. We base this view on several factors indisputably present in this case.

When S. B. 2001 was submitted, it was specifically objected to by the Attorney General, who concluded that it violated § 5. Insofar as this court's interim plan-making task is controlled by the Voting Rights Act, we may not substitute our judgment for that of the Attorney General. Perkins v. Matthews, 400 US 379, 27 L ed 2d 476 (1971). The proceedings under that Act which the State of Mississippi has instituted in the District Court of the District of Columbia will determine whether S. B. 2001 passes statutory muster for permanent use. It would be both inappropriate and unseemly for us to implement on a temporary basis the plan which those proceedings seek to preclear since we have other plans which will allow us to order temporary redistricting which adequately reconciles state political policy with federal statutory and constitutional standards. For these reasons the court rejects the defendants' suggestion that S. B. 2001 may be used on an interim basis. We expressly refrain from any action which may be viewed as indicating a position on either side of the issues pending in the District Court for the District of Columbia.

As to the existing 1972 congressional plan, the command of Art. 1, § 2 of the United States Constitution is that representatives be chosen "by the People of the several States." That article permits only those population variances among congressional districts that are "unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." Kirkpatrick v. Preisler, 394 US 526, 531, 22 L ed 2d 519, 525 (1969); Wesberry v. Sanders, 376 US 1, 11 L ed 2d 481 (1964). Under admitted facts, the state's existing plan with a 17.6% population variance renders it grossly malapportioned, and since it is readily apparent that this degree

of malapportionment is not unavoidable, we declare it to be unconstitutional, and plaintiffs are entitled to summary judgment on that issue as a matter of law.[5] Since plans with substantially lower population variances are available for use, implementation of the 1972 plan, even on an interim basis, would be without justification, and defendants' contention that the 1972 plan be used temporarily is not constitutionally permissible.[6] Accordingly, our decision is narrowed to consideration of the two Kirksey plans and the Simpson amendment proposal.

In determining which plan to place into effect as an interim plan, we must "reconcil[e] the requirements of the Constitution with the goals of state political policy." Connor v. Finch, 431 US 407, 414, 52 L ed 2d 465 (1977). Moreover, *McDaniel*, *supra*, compels us to consider § 5 criteria. Thus, any plan adopted by this court as a temporary method of ensuring upcoming elections cannot violate Art. 1, § 2, the fourteenth amendment, or the Voting Rights Act. In particular, such a plan must satisfy the one person, one vote rule and avoid any dilution of minority voting strength. The three plans before us comply with these federal considerations and no tenable argument could otherwise be made. Since federal standards are met, we must now analyze each plan in light of the state's political policies.

We are guided by the Supreme Court's recent decision in Upham v. Seamon, —— US ——, 71 L ed 2d 725 (1982). In *Upham*, the Court clearly held that, in fashioning an interim reapportionment order, a district court

---

[5] *See Kirkpatrick*, *supra* (invalidating plan with variance of 5.97%) and Wells v. Rockefeller, 394 US 542, 22 L Ed 2d 535 (1969) (variance of 13.1% invalid).

[6] This is not a case such as *Wells*, *supra*, and Kilgarlin v. Hill, 386 US 120, 17 L ed 2d 771 (1967), wherein the courts were required, because of exigent circumstances, to implement malapportioned redistricting plans. In the case sub judice, plans with much lower population variance are readily available.

must adhere to the state's political policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act. *See also*, White v. Weiser, 412 US 783, 795, 37 L ed 2d 335, 346 (1973). As adduced at trial, the state's primary political policies reflected in the passage of S. B. 2001 may be summarized as follows: (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. As to the latter policy, the majority of the Joint Committee and legislature subscribed to the belief that a plan with two minority districts containing at least 40% black population was preferable to a plan that sacrificed two such "high impact" minority districts for one district with a significant black majority. The prevailing legislative view was that in order to ensure a congressman's responsiveness to the needs and interests of black citizens, the district should be at least 40% black whenever possible; any lesser percentage, in its view, would likely result in insensitivity to the black constituency.

In determining the validity vel non of these state policies, we note the Attorney General's conclusion that the state's action in drawing lines for Districts 1, 2 and 3 from east to west violated § 5 by unlawfully diluting black voting strength. Since the validity of that determination lies at the heart of the proceedings now pending in the District Court of the District of Columbia, we simply accept that decision for the purposes of this ruling without any indication of a view on its merits. No one argues that the second and third policies offend either the Constitution or the Voting Rights Act. As to the last factor, plaintiffs contend only that one 65% black majority district would better serve the interests of blacks than would two 40% or better black population districts since a 65% black district is more likely to assure election of one black congressman. However, we are bound by the

legislative preference for two high black impact districts unless that determination violates constitutional or statutory mandates. We emphasize that it is not our function to substitute our judgment for the state's political program in this respect, absent federal invalidity. We find no federal bar to this aspect of the state's political objective.

At the outset, we note that neither the Constitution nor the Voting Rights Act requires proportional representation. City of Mobile v. Bolden, 446 US 55, 64 L ed 2d 47 (1980); White v. Regester, 412 US 755, 37 L ed 2d 314 (1973). What is required is that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength. *White v. Regester, supra.* As noted by the District of Columbia Court in State of Mississippi v. United States, 490 F. Supp. 569, 582 (D.D.C. 1979) (three-judge court), *aff'd mem.* 444 US 1050 (1980), in applying § 5 criteria: "No state or political subdivision is required to search for ways to maximize the number of black voting age population districts. Likewise, no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength." Moreover, the Fifth Circuit has recognized that "the realities of partisan politics may enable a minority in some circumstances to exact more political concessions by swinging its vote to one of two candidates whose majority-race following is approximately equal than it could by electing a candidate of his own identity." Wyche v. Madison Parish Police Jury, 635 F. 2d 1151, 1160 (5 Cir. 1981). And "[a] court-ordered racial gerrymander which would assure that blacks form a sizeable electoral majority in a single district may not be nearly as effective a guarantee of access as the creation of two or more districts with substantial black voter populations such that all candidates in those districts must be responsive to the needs and aspirations

of the black electorate." United States v. Board of Supervisors of Forrest County, 571 F. 2d 951, 956 (5 Cir. 1978). Since the establishment of a "safe" minority seat is not a federal prerequisite of a reapportionment plan, *Wyche*, *supra*, at 1161, we conclude that the state's policy of favoring 40% or better black population districts was legitimate.

A consideration of these legitimate state political policies compels us to adopt, as an interim redistricting plan, the Simpson amendment. The Kirksey plans are repugnant to valid state policies inasmuch as they erode the electoral bases of incumbent congressmen in Districts 2 and 4, contain a larger population variance than the Simpson amendment, and disregard the state's policy of creating two high black impact districts. Moreover, these plans represent an obvious racial gerrymander by running a line from District 2 partially into metropolitan Hinds County and the City of Jackson solely to include a large and overwhelming black population corridor having little in common with the rest of what is essentially a rural district.

The Simpson amendment, on the other hand, more nearly satisfies the state's criteria by: (1) preserving constituencies of incumbents; (2) maintaining a population deviation of only .2141%; and (3) creating two 40% or better black districts. In addition, the Simpson amendment accords with racial fairness by including a majority black district of 53.77% centered in the Delta area. Plaintiffs challenge that the Simpson amendment or any other plan without a 65% or better black majority district violates the § 5 standard against retrogression of minority voting strength, relying upon Beer v. United States, 425 US 130, 47 L ed 2d 629 (1976). We reject this argument which is based upon the premise that the correct benchmark for measuring retrogression is former District 3, as it existed in the 1956 plan, and containing 11 Delta counties having a 65.51% black majority under

1960 census figures. Laying aside the state's position that retrogression should be determined by comparison with the 1972 plan, it is clear that since the Voting Rights Act became effective on November 1, 1964, retrogression must be determined in accordance with district lines existing no earlier than that date. The plan then in effect, i.e., the 1962 plan, contained the same Delta counties as the 1956 plan, combined with 13 other counties to form old District 2, which then had a 59.29% black majority population. Of course, if the district lines in effect on November 1, 1964, had never been changed, § 5 retrogression could not be implicated, even if there was a reduction in the percentage of blacks residing in former District 2. Computations show that, under 1980 census figures, the formerly 59.29% black majority district is now comprised of only 48.09% black population. Thus, the Simpson amendment with a 53.77% majority district represents an augmentation, rather than diminution, of black voting strength.

Other significant advantages inherent in the Simpson amendment are that it splits only two sparsely settled counties along established precinct lines, preserves a high degree of community of interest in all five districts, including the black majority District 2 which is chiefly an agricultural area, and satisfies concepts of contiguity and compactness. It is equitable that these considerations be taken into account in choosing a plan. We therefore find that the Simpson amendment most nearly satisfies constitutional and statutory constraints while reconciling state political policy, and direct it be used by the State of Mississippi pending preclearance of a statutorily permissible plan.

Accordingly, the court hereby establishes congressional districts for primary and general elections for 1982, and thereafter until a plan is precleared by the State under § 5 of the Voting Rights Act, as follows:

District No. 1 shall consist of the following counties and parts thereof: DeSoto, Tate, Panola, Tallahatchie (all except the precincts of Phillip, Leverette and Cascilla), Marshall, Lafayette, Yalobusha, Grenada, Calhoun, Benton, Tippah, Union, Pontotoc, Chickasaw, Alcorn, Tishomingo, Prentiss, Lee, Itawamba and Monroe.

District No. 2 shall consist of the following counties and parts thereof: Tunica, Coahoma, Quitman, Bolivar, Washington, Sunflower, Tallahatchie (precincts of Phillip, Leverette and Cascilla), Leflore, Carroll, Montgomery, Webster, Choctaw, Attala, Leake, Madison, Holmes, Humphreys, Yazoo, Sharkey, Issaquena and Warren.

District No. 3 shall consist of the following counties and parts thereof: Clay, Oktibbeha, Lowndes, Winston, Noxubee, Neshoba, Kemper, Rankin, Scott, Newton, Lauderdale, Simpson (all except the precincts of Harrisville, Pearl, Fork Church and Bridgeport), Smith, Jasper, Clarke and Jones.

District No. 4 shall consist of the following counties and parts thereof: Hinds, Claiborne, Copiah, Jefferson, Adams, Franklin, Lincoln, Lawrence, Jefferson Davis, Wilkinson, Amite, Pike, Walthall, Marion, Simpson (precincts of Harrisville, Pearl, Fork Church and Bridgeport).

District No. 5 shall consist of the following counties: Covington, Wayne, Lamar, Forrest, Perry, Greene, Pearl River, Stone, George, Hancock, Harrison and Jackson.

The boundaries of all counties and precincts mentioned above shall be such boundaries as they existed on July 1, 1981. A map depicting the aforesaid plan is appended to this opinion.

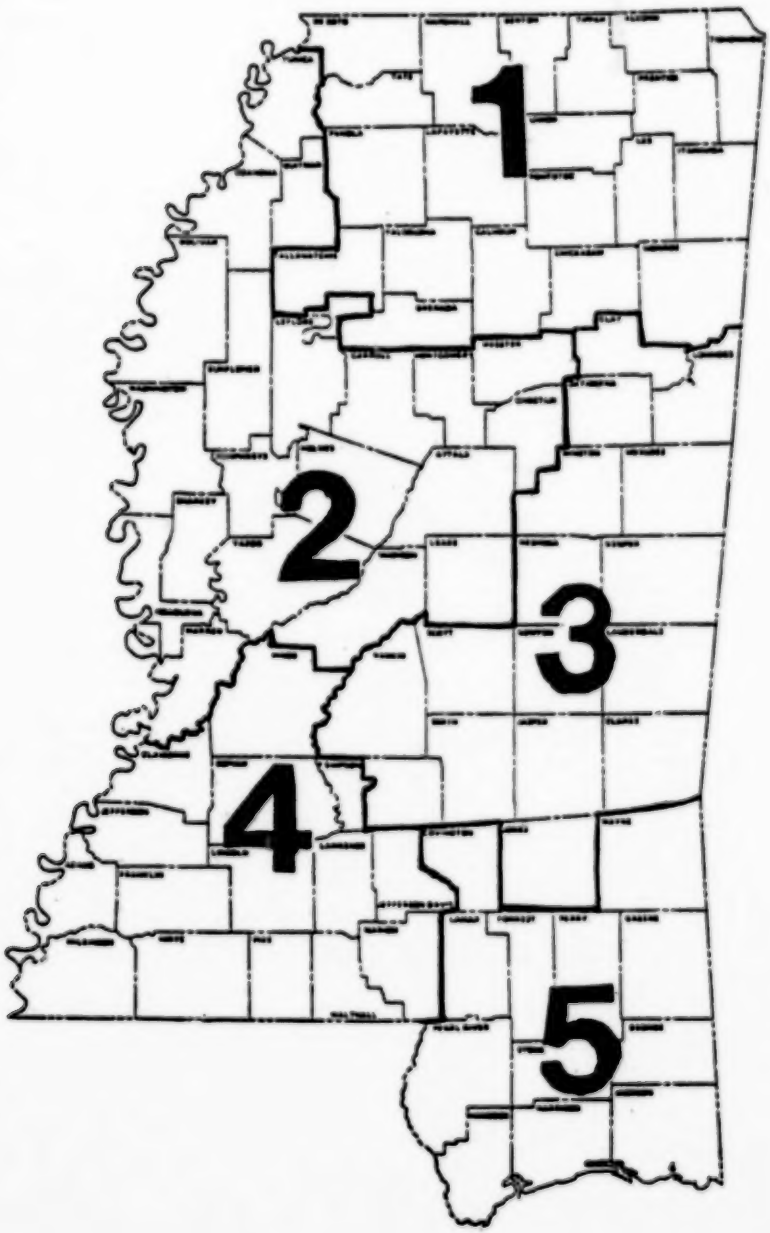
Furthermore, the court, after considering the time requirements for candidate qualification and campaigning, and to prepare for the orderly conduct of the 1982 con-

gressional primary and general elections, orders into effect the following schedules:

July 13, 1983 at 6 p.m.	Deadline for candidate qualification for primaries
August 17, 1982	First Primary
August 31, 1983 [sic]	Second Primary
September 14, 1982 at 6 p.m.	Deadline for independent candidate qualification
November 2, 1982	General election.

Our order shall also specify further election procedures applicable to the 1982 congressional primary and general elections.

COURT-ORDERED INTERIM CONGRESSIONAL REDISTRICTING PLAN



IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

No. GC 82-80-WK-O

DAVID JORDAN and SAMMIE CHESTNUT, On Behalf of the Greenwood Voters Leage, Individually and on Behalf of others similarly situated,

Plaintiffs

v.

WILLIAM WINTER, Governor of Mississippi; T. H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J. C. "CON" MALONEY, Secretary, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives,

Defendants

No. GC 82-81-WK-O

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of all others similarly situated,

Plaintiffs

v.

WILLIAM F. WINTER, Governor of Mississippi, WILLIAM A. "BILL" ALLAIN, Attorney General of Mississippi, EDWIN LLOYD PITTMAN, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants

ORDER

A three-judge court having been convened pursuant to law to hear the above consolidated actions, and after trial having decided the issues in accordance with Memorandum Opinion this date released, it is

ORDERED

1. S. B. 2001, also known as 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8, a statute providing for the redistricting of Mississippi's five congressional districts for the election of members of the United States House of Representatives, is legally unenforceable until it has been precleared in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c, and the above named defendants are hereby enjoined from implementing or seeking to implement such statute for election of members of the United States House of Representatives for Mississippi until it has been so precleared.

2. Miss. Code Ann. § 23-5-223 (1972), which prescribes the existing congressional districting plan for the State of Mississippi, is declared unconsitutional as violative of Art. 1, § 2, and the fourteenth amendment to the United States Constitution, and the above named defendants are hereby enjoined from hereafter enforcing or seeking to enforce said statute for election of members of the United States House of Representatives for Mississippi.

3. There is hereby ordered into effect an interim plan establishing congressional districts for primary and general elections for 1982, and thereafter until a redistricting plan enacted by the State of Mississippi is precleared in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c, as follows:

> District No. 1 shall consist of the following counties and parts thereof: DeSoto, Tate, Panola, Tallahatchie (all except the precincts of Phillip, Leverette and Cascilla), Marshall, Lafayette, Yalobusha, Grenada, Calhoun, Benton, Tippah, Union, Pontotoc, Chickasaw, Alcorn, Tishomingo, Prentiss, Lee, Itawamba and Monroe.

District No. 2 shall consist of the following counties and parts thereof: Tunica, Coahoma, Quitman, Bolivar, Washington, Sunflower, Tallahatchie (precincts of Phillip, Leverette and Cascilla), Leflore, Carroll, Montgomery, Webster, Choctaw, Attala, Leake, Madison, Holmes, Humphreys, Yazoo, Sharkey, Issaquena and Warren.

District No. 3 shall consist of the following counties and parts thereof: Clay, Oktibbeha, Lowndes, Winston, Noxubee, Neshoba, Kemper, Rankin, Scott, Newton, Lauderdale, Simpson (all except the precincts of Harrisville, Pearl, Fork Church and Bridgeport), Smith, Jasper, Clarke and Jones.

District No. 4 shall consist of the following counties and parts thereof: Hinds, Claiborne, Copiah, Jefferson, Adams, Franklin, Lincoln, Lawrence, Jefferson Davis, Wilkinson, Amite, Pike, Walthall, Marion, Simpson (precincts of Harrisville, Pearl, Fork Church and Bridgeport).

District No. 5 shall consist of the following counties: Covington, Wayne, Lamar, Forrest, Perry, Greene, Pearl River, Stone, George, Hancock, Harrison and Jackson.

The boundaries of all counties and precincts mentioned above shall be such boundaries as they existed on July 1, 1981. A map depicting the foregoing court-ordered interim congressional redistricting plan is appended hereto as Exhibit "A".

4. There is hereby ordered into effect the special time schedule and other procedures respecting the 1982 congressional primary and general elections:

July 13, 1982 at 6 p.m.	Deadline for candidate qualification for primaries
August 17, 1982	First Primary
August 31, 1982	Second Primary
September 14, 1982 at 6 p.m.	Deadline for independent candidate qualification
November 2, 1982	General election.

5. All persons who have previously announced, paid qualifying fees and otherwise qualified as 1982 candidates for any congressional district may reannounce their candidacy on the basis of the districts hereinabove established and requalify with state and party officials, but are excused from paying additional qualifying fees; and in case a previously announced candidate may choose to run in a district having a different designation by number, such person may, upon direction to the appropriate officials, obtain transfer of the sum so paid. All Mississippi election statutes in conflict with the foregoing terms of this order are stayed only to the extent of such conflict for the initial purpose of conducting the 1982 congressional elections; otherwise provisions of state law remain unaffected.

The above named defendants with statutory and political party authority to conduct the 1982 congressional elections are hereby enjoined and commanded to schedule, prepare for, hold, conduct, and certify such elections strictly in accordance with ¶¶ 3, 4 and 5 hereof.

The court reserves the power to issue supplemental orders, should the need arise, to carry out the provisions of this order.

This, 8th day of June, 1982.

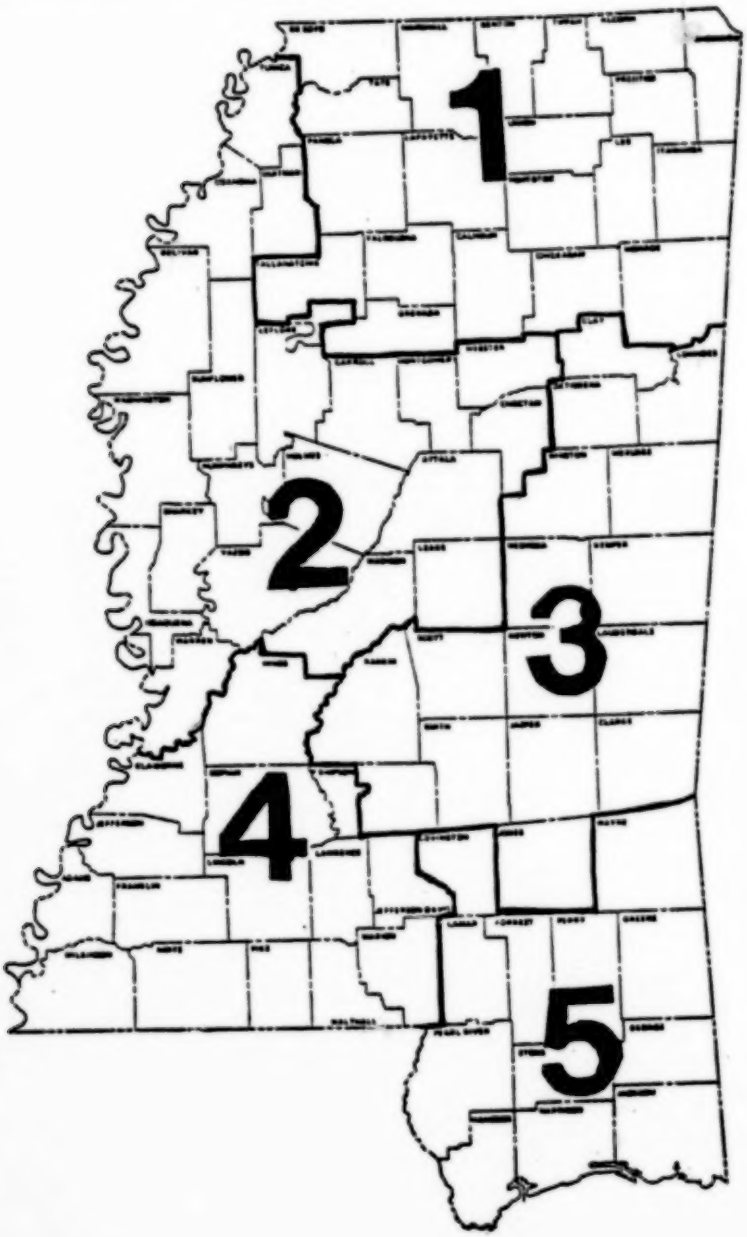
/s/ Charles Clark
United States Circuit Judge

/s/ William C. Keady
United States District Judge

/s/ L. T. Senter, Jr.
United States District Judge
[SEAL]

EXHIBIT "A"

COURT-ORDERED INTERIM CONGRESSIONAL REDISTRICTING PLAN



APPENDIX B

Attorney General's Section 5 Objection Letter

[SEAL]

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

Office of the Assistant Attorney General

Washington, D.C. 20530
30 Mar. 1982

Jerris Leonard, Esq.
Jerris Leonard & Associates
Suite 1020
900 Seventeenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Leonard:

This is in reference to Senate Bill No. 2001 (1981), providing for the reapportionment of the Mississippi Congressional districts, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received initially on November 10, 1981, and completed with additional information on January 29, 1982.

Under Section 5, the State bears the burden of showing the absence of both discriminatory purpose and effect in the proposed Congressional redistricting plan. *City of Rome* v. *United States*, 446 U.S. 156, 183 n.18 (1980); *Beer* v. *United States*, 425 U.S. 130, 140-141 (1976). While the State is under no obligation to maximize minority voting strength, the State must demonstrate that the plan "fairly reflects the strength of black voting power as it exists." *Mississippi* v. *United States*, 490 F.

Supp. 569, 581 (D. D.C. 1979), citing *Beer* v. *United States, supra,* 425 U.S. at 139 n.11 and 141; and *City of Richmond* v. *United States,* 422 U.S. 358, 362 (1975).

We have given careful consideration to all of the materials provided by the State, as well as to information and comments from other interested parties. As a backdrop for our analysis and determination in this matter, we note briefly the history of Congressional apportionment in Mississippi in recent years.

Since the late 1800's and until 1966, the State of Mississippi maintained a Congressional districting configuration which included a majority black district in the Mississippi Delta area. The State's reapportionment of 1966 did not continue a Delta district similar to the one which at that time had included a sixty-five percent black population majority. Rather, the 1966 plan inaugurated a districting configuration which fragmented the Delta area among three districts. That plan was never submitted for Section 5 preclearance but the federal district court, in an ensuing constitutional challenge to the plan (*Connor* v. *Johnson,* 279 F. Supp. 619 (S.D. Miss. 1966), aff'd, 386 U.S. 483 (1967)), held that the plaintiffs had failed to carry the burden of proving purposeful discrimination pursuant to the Fifteenth Amendment. When the State reapportioned in 1972, following the 1970 Census, it essentially readopted the 1966 plan, making only those modifications necessary to satisfy the "one man, one vote" requirement. The State submitted the 1972 plan to the Attorney General pursuant to Section 5 and no objection was interposed. However, the Attorney General's decision was, as expressly stated in the 1972 no objection letter, not based on an independent review of the merits of the plan under Section 5, but, rather, rested solely on the view held at that time that the decision in *Connor* v. *Johnson, supra,* was binding on the Attorney General.

Later decisions of the United States Supreme Court have made it clear that any legislatively enacted reap-

portionment plan, may not be considered effective as law until it has received clearance under Section 5 regardless of other proceedings in federal court. See *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Finch*, 431 U.S. 407 (1977); *McDaniel* v. *Sanchez*, 101 S. Ct. 2224 (1981). The import of these decisions demonstrates that it was wrong in 1972 to defer to the decision in *Connor* v. *Johnson*, *supra*, without making an independent review of the plan on its merits under the purpose/effect standard of Section 5.

As a result of this highly unusual history of Congressional reapportionment in Mississippi, no Congressional reapportionment plan enacted since the effective date of Section 5 has received the scrutiny Congress intended "to ensure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." S. Rep. No. 94-295, 94th Cong., 1st Sess. 19 (1975).

As the law now stands, we are not bound by the disposition of the 1966 plan by the *Connor* court or the formal preclearance of the 1972 plan in reviewing whether the instant apportionment has the proscribed purpose or effect. Rather, we are compelled by the more recent Supreme Court decisions reflecting the true intent of Congress under the Voting Rights Act, to assure ourselves that the instant plan "fairly reflects the strength of black voting power as it exists." *Mississippi* v. *United States*, *supra*, 490 F. Supp. at 581.

Our analysis shows that, according to 1980 Census data, the State is authorized five congressional districts and has a population which is 35.2 percent black. The black population in large part still is concentrated in the Delta region. District Nos. 1, 2 and 3 of the reapportionment plan have been drawn horizontally across the majority-black Delta area in such manner as to dismember the black population concentration and effectively dilute its voting strength.

Alternate proposals were presented to the reapportionment body which would have avoided the fragmentation and dilution of minority voting strength in the Delta area, and we have received complaints that such alternate proposals were rejected for racially discriminatory reasons. Our own review has revealed that, in fact, reasonable alternatives could be drawn which would avoid the fragmentation and dilution of minority voting strength in the Delta area and the State's submission offers no satisfactory explanation for, or governmental interest in, the rejection of such alternatives. The adoption of the east-west configuration of the proposed plan, instead of a configuration which recognizes the Delta as a community of interest, suggests to us an unnecessary retrogression in the position of black voters in Mississippi.

Accordingly, we are unable to conclude that the submitted plan meets the requirements of the Act in its treatment of the Delta area. I must, therefore, on behalf of the Attorney General, interpose an objection to Senate Bill No. 2001 pursuant to Section 5 of the Voting Rights Act of 1965.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, the Procedures for the Administration of Section 5 (Section 51.44, 46 Fed. Reg. 878) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the implementation of Senate Bill No. 2001 (1981) legally unenforceable.

If you have any questions concerning this letter, please feel free to call Carl W. Gabel (202-724-8388), Director of the Section 5 Unit. You can be assured that we are prepared to assist you in any way possible in connection with your reapportionment efforts.

Sincerely,

/s/ Wm. Bradford Reynolds
WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division

cc: Honorable Bill Allain
Attorney General
State of Mississippi

APPENDIX C

Memorandum Opinion, *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C. June 28, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0956

STATE OF MISSISSIPPI,
Plaintiff,

v.

WILLIAM FRENCH SMITH,
Defendant,

HENRY J. KIRKSEY, ET AL.,
Intervening Defendants.

MEMORANDUM

Before WRIGHT, *Circuit Judge*; GESELL, *District Judge*.[1]

The State of Mississippi has filed this action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1976), seeking a declaratory judgment that the 1981 reapportionment of the State's congressional districts (S.B. 2001) "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* This matter is now before the Court after full argument on plaintiff's motion for partial summary judgment and plaintiff's motion *in*

---

[1] Judge Richey, the third member of the panel, did not participate.

limine and the respective oppositions thereto filed by the United States and intervening defendants.

Mississippi seeks a determination prior to trial that the nonretrogression principle announced in *Beer* v. *United States*, 425 U.S. 130 (1976), requires that the effect of the 1981 reapportionment plan must be measured by comparison with the Mississippi reapportionment plan adopted in 1972. Further, by its motion *in limine* Mississippi seeks an order "limiting the evidence on the issue of discriminatory purpose to the legislative process in 1981 which culminated in the development and enactment" of the 1981 plan. In opposition it is urged that the Court must consider in this proceeding pre-1981 evidence of the alleged continuing purpose of Mississippi to discriminate and that the retrogressive effect of the 1981 plan should be measured by comparison with apportionment plans in effect in 1964 or prior thereto.

The crux of this dispute is the claim that Mississippi has divided black voters residing in the so-called Delta Region among several different congressional districts for the purpose of preventing the election of a black to the United States Congress. The Delta Region is a distinct geographical and cultural region in the northwestern part of the State. Although black persons residing in the State comprise only 35.2 percent of the total population, the Delta historically had a high proportion of blacks and according to the most recent Census was majority black in 1980. Given the apparent prevalence of block voting in Mississippi, the United States claims that Mississippi's current apportionment scheme continues to deprive blacks of the opportunity to elect one of their own race to the House.

A brief review of the developments in Mississippi will aid understanding of our decision. The stipulated record demonstrates that since the late nineteenth century through the date of enactment of the Voting Rights Act,

the Delta Region has been contained in one congressional district despite numerous other districting changes required by changes in population or political considerations over this period. Although blacks were a potential electoral majority in the Delta district under each of these various plans, they exerted virtually no political control because of the State's "long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting. . . ." *United States* v. *Mississippi*, 380 U.S. 128, 135-36 (1965). In 1964, only 6.7 percent of blacks in Mississippi eligible to vote were registered. As various restrictions on black registration and voting were removed, blacks in the Delta Region gained more and more voting strength.

In 1965 a suit was instituted in federal court, challenging the then-exsiting 1962 plan as violative of the one-person, one-vote formula. *Connor* v. *Johnson*, Civ. 3380 (S. D. Miss. October 19, 1965). In response to this litigation the State legislature undertook a comprehensive reapportionment of the State congressional districts. Under the plan adopted by the legislature on April 7, 1966, the Delta Region, which had a longitudinal configuration, was divided horizontally among three districts, eliminating the 59 percent black majority that then existed in the Delta Region. As a result of this reapportionment no district in the State had a majority black voting age population. This plan was submitted to the *Connor* v. *Johnson* Court, which held that the plan was not racially discriminatory and also satisfied the one-man, one-vote constitutional standard. *Connor* v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967). Although this apportionment plan required preclearance pursuant to section 5 of the Voting Rights Act, *see McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), it was not submitted to the Attorney General for preclearance nor was it the subject of a declaratory judgment action in the United States District Court for the District of Co-

lumbia. As a result, the 1966 plan was never scrutinized under Voting Rights Act standards.[2]

Following the 1970 Census the State of Mississippi was required to adopt a new apportionment plan to reflect population changes. In broad outline, however, the State simply reenacted the 1966 plan; each of the State's five congressional districts was majority white in population. The State submitted this 1972 plan to the Attorney General for preclearance pursuant to section 5 of the Voting Rights Act. The Attorney General did not make a factual determination as to whether the State had demonstrated that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Rather, it was simply indicated:

> The Attorney General will not object to [the 1972 plan]. The basis of this decision is our reading of *Connor* v. *Johnson*, 279 F. Supp. 620 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967), in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state. Because we feel bound by the decisions of the courts in that case, we do not interpose an objection.

---

[2] Plaintiff's suggestion that the ruling that apportionment plans are subject to section 5 review, *see* Georgia v. United States, 411 U.S. 526 (1973), should only be applied prospectively in light of Allen v. State Board of Elections, 393 U.S. 544 (1969), is entirely without merit. Although the *Allen* Court declined to overturn elections based on various enactments affecting voting which were not clearly within the scope of section 5 prior to the Court's decision, the Court did not suggest that the enactments could be used in the future either for the purpose of conducting elections or as benchmarks against which to measure future electoral changes under section 5. Indeed, the Court specifically directed the District Courts on remand "to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with § 5." *Id.* at 572.

This position was consistent with the then-policy of the Department of Justice not to make a section 5 determination in those instances where the voting change had previously been addressed by a federal district court and found to meet constitutional standards. *See Morris* v. *Gressette*, 432 U.S. 491, 497, n.8 (1977); *Georgia* v. *United States*, 411 U.S. 526, 535 n.6 (1973).

Subsequent Supreme Court decisions reveal the error of this policy. It is now clear that section 5 preclearance procedures must be followed even where there has been a federal court determination that the plan meets constitutional standards. *See McDaniel* v. *Sanchez*, 452 U.S. 130, 150-51 (1981); *Connor* v. *Waller*, 421 U.S. 656 (1975) (*per curiam*); *Harper* v. *Levi*, 520 F.2d 53, 69 (D.C. Cir. 1975). (Attorney General's deference to constitutional adjudication is "fundamentally inconsistent with clearly expressed congressional intent underlying Section 5"). Indeed, it is now apparent that the *Connor* v. *Johnson* Court lacked jurisdiction to consider the constitutionality of the plan before it had been precleared pursuant to section 5. *See McDaniel* v. *Sanchez*, 452 U.S. at 153.

In 1981 Mississippi was again required to adopt a new congressional apportionment plan to reflect further population changes disclosed by the 1980 Census. Although the legislature discussed the possibility of recreating a black majority vote in the Delta district this, as well as other alternatives, was rejected. The adopted plan provides for five congressional districts with a configuration virtually identical to the 1966 and 1972 lines; each of these districts is majority white. The plan was submitted to the Attorney General for section 5 review and on March 30, 1982, a timely section 5 objection was interposed. The plan is now before this Court for section 5 review.

In April, 1982, certain black residents of the State of Mississippi, some of whom are also defendant-intervenors

in this action, filed suit in the United States District Court for the Northern District of Mississippi seekng to enjoin implementation of the 1981 plan because it had not been approved by the Attorney General or this Court. The plaintiffs also sought to enjoin implementation of the congressional districting plan adopted in 1972 on the ground that the existing districts were unconstitutionally malapportioned. After the parties had fully briefed the issues in this case but prior to oral argument the Mississippi Court issued an opinion holding the 1972 plan unconstitutional as violative of the one-man, one-vote principle and enjoined its use. The Court also enjoined implementation of the 1981 plan pending a determination by this Court that the plan does not violate the Voting Rights Act or until another redistricting plan enacted by the State of Mississippi is precleared in accordance with section 5.

Given the need promptly to establish an electoral scheme to govern imminent congressional primary and general elections and its understanding that this Court could not rule on the 1981 plan for several months, the Mississippi Court ordered into effect an interim plan for the 1982 elections. Based on evaluation of black voting strength under different voting schemes, one-man, one-vote considerations, as well as various state political factors, the Court adopted the so-called Simpson amendment, which was considered but ultimately rejected by the legislature in 1981 in favor of S.B. 2001. The Simpson amendment provides for a black majority district of 53.8 percent centered in the Delta Region. The Simpson plan remains in effect until a redistricting plan enacted by the State of Mississippi is preclared under section 5 of the Voting Rights Act.

As initially presented to the Court upon the briefs, this motion for partial summary judgment raised the issue whether the Court was required to compare the 1981 plan to the 1972 plan or, in the alternative, to the prior

plan adopted in 1966, in determining whether the 1981 plan has an impermissible retrogressive effect, or whether instead the proper benchmark for such determination was some other apportionment plan adopted prior to 1966. It is very doubtful that an apportionment plan never reviewed on the merits under section 5 and which in fact is retrogressive compared to the districting scheme in effect on the effective date of the Voting Rights Act can ever serve as a firm benchmark for the purpose of measuring the possible discriminatory effect of subsequent plans. Although certain decisions appear to suggest that the existing plan is at least presumptively the appropriate benchmark, those opinions are distinguishable on their facts from the problem presented here. *See Beer* v. *United States*, 425 U.S. 130 (1976); *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977). Furthermore, it would appear inconsistent with the intent of Congress in requiring section 5 review of every electoral change "different from that in force or effect on November 1, 1964," 42 U.S.C. § 1973c, to hold that an apportionment plan that is retrogressive as compared to the plan in effect on the effective date of the Act establishes a new benchmark for section 5 review. Whether in fact the 1981, the 1972 or the 1966 plans are retrogressive relative to the apportionment plan in effect on November 1, 1964, can, of course, be resolved only after a full hearing. In any event, the Court finds it unnecessary definitively to resolve these issues, at least at this time, in view of the recent order of the Three-Judge District Court for the Northern District of Mississippi.

The Court holds that whether or not the 1972 reapportionment plan (or prior 1966 plan) can serve as a benchmark, S.B. 2001 must, at a minimum, be shown not to be retrogressive relative to the plan ordered into effect by the Three-Judge Mississippi Court. In *United States* v. *Mississippi*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980), the Court held based on almost identical facts that a judicial plan ordered into

effect subsequent to the filing of a section 5 declaratory judgment action should be considered the preexisting plan and at least the initial benchmark against which to assess the effect of the statutory plan, *id.* at 582.[3] We believe that this decision stands for at least this much: a section 5 declaratory judgment should be denied when the electoral plan under review is retrogressive in comparison to a court-ordered plan that will be implemented absent approval of the statutory plan. It would be entirely inconsistent with the teaching of *Beer* to suggest that the Court must accept a statutory plan that increases black voting strength to a lesser degree than a court-ordered plan in effect merely because the court-ordered plan will exist only until another plan is precleared under section 5.

On the present record, it appears that this initial inquiry may be decisive of the issue whether the 1981 plan violates the nonretrogression standard of the Voting Rights Act. Accordingly, we will defer any definitive resolution of the question whether either the 1972 or 1966 plan may serve as a benchmark pending a full factual inquiry into the possible retrogressive effect of the 1981 plan relative to the court-ordered plan. If plaintiff is of the view that it can establish that the 1981 plan is not retrogressive in comparison with the court-ordered plan then this matter must proceed to trial at the earliest possible date. Mississippi's continuing

---

[3] We note that the Supreme Court's summary affirmance has only limited precedential value, especially given that the District Court noted in the alternative that the plan under review satisfied the nonretrogression principle when compared to the earlier 1975 plan. 490 F. Supp. at 582 n.6. *See* Fusari v. Steinberg, 419 U.S. 379, 391-92 (Burger, C.J., concurring) (summary affirmance of three-judge court "affirm[s] the judgment but not necessarily the reasoning"). On the other hand, the affirmance is perhaps due added weight because the three Justices who dissented on the merits explicitly stated that the court-ordered plan was the proper benchmark. *See* 444 U.S. at 1052 (Marshall, J. dissenting).

right to seek approval of any plan under section 5 at any time must be fully recognized.

The only remaining issue is whether evidence pertaining to possible discriminatory intent should be limited to the 1981 legislative process or whether evidence of the alleged discriminatory purpose underlying prior apportionment plans and carried forward by S.B. 2001 may be considered. The motion *in limine* will be denied. The value of historical background information for the purpose of assessing present discriminatory intent is well recognized. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977); *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980). The appropriate weight, if any, to give this evidence can be determined by the Court based on a more complete legal and factual record.

Both the motion for partial summary judgment and the motion *in limine* shall be denied. An appropriate Order is filed herewith.

/s/ J. Skelly Wright
United States Circuit Judge

/s/ Gerhard A. Gesell
United States District Judge

June 28, 1982.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0956

STATE OF MISSISSIPPI,
Plaintiff,

v.

WILLIAM FRENCH SMITH,
Defendant,

HENRY J. KIRKSEY, ET AL.,
Intervening Defendants.

ORDER

Before WRIGHT, *Circuit Judge*; GESELL, *District Judge.*

For the reasons stated in the Court's Memorandum filed herewith, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that plaintiff's motion *in limine* is denied; and it is further

ORDERED that a status conference is set in Courtroom No. 6 at 9:00 a.m. on July 14, 1982, to set a definite schedule for any further proceedings that may be deemed appropriate.

/s/ J. Skelly Wright
United States Circuit Judge

/s/ Gerhard A. Gesell
United States District Judge

June 28, 1982.

APPENDIX D

Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

Civil Action No. GC 82-81-WK-O

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of all others similarly situated,

Plaintiffs

vs.

WILLIAM F. WINTER, Governor of Mississippi, WILLIAM A. "BILL" ALLAIN, Attorney General of Mississippi, EDWIN LLOYD PITTMAN, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants

[Filed Jun. 15, 1982]

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Owen H. Brooks, Sarah H. Johnson, Harold R. Mayberry, Willie Long, Robert

E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry, plaintiffs in *Brooks* v. *Winter*, Civil No. GC 82-81-WK-O, hereby appeal to the Supreme Court of the United States from the Order entered in this action on June 9, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

/s/ Johnnie E. Walls, Jr.
JOHNNIE E. WALLS, JR.
Walls, Buck & Irving, Ltd.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

FRANK R. PARKER
WILLIAM L. ROBINSON
BARBARA Y. PHILLIPS
PATRICIA M. HANRAHAN
Lawyer's Committee for Civil Rights Under Law
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

ROBERT BRUCE MCDUFF
Ratner & Sugarmon
Suite 525
Commerce Title Building
Memphis, Tennessee
(901) 525-8601

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Johnnie E. Walls, Jr., certify that all parties required to be served have been served.

This the 15th day of June, 1982.

/s/ Johnnie E. Walls, Jr.
JOHNNIE E. WALLS, JR.

APPENDIX E

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1973c:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory

judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Office-Supreme Court, U.S.
FILED
DEC 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

---

SUPPLEMENTAL BRIEF FOR APPELLANTS

WILLIAM L. ROBINSON
* FRANK R. PARKER
PATRICIA M. HANRAHAN
ROBERT B. MCDUFF
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

Attorneys for Appellants

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE DEFEAT OF BLACK CANDIDATE ROBERT G. CLARK IN THE NOVEMBER GENERAL ELECTION SUBSTANTIATES APPELLANTS' CONTENTIONS THAT THE DISTRICT COURT-ORDERED PLAN IS INADEQUATE AS A REMEDY FOR RACIAL GERRYMANDERING OF CONGRESSIONAL DISTRICTS AND DEPRIVES BLACK DELTA VOTERS OF AN EQUAL OPPORTUNITY TO ELECT CANDIDATES OF THEIR CHOICE	1
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
Connor v. *Finch*, 431 U.S. 407 (1977)	6
(Jackson) *Clarion-Ledger*	2, 3, 4, 5
Jackson Daily News	3, 4, 5, 6
New York Times	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-233

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

---

SUPPLEMENTAL BRIEF FOR APPELLANTS

Appellants, Owen H. Brooks, et al., pursuant to Sup. Ct. Rule 16.6 file herewith their supplemental brief calling attention to intervening facts not available at the time of the filing of our last brief.

THE DEFEAT OF BLACK CANDIDATE ROBERT G. CLARK IN THE NOVEMBER GENERAL ELECTION SUBSTANTIATES APPELLANTS' CONTENTIONS THAT THE DISTRICT COURT-ORDERED PLAN IS INADEQUATE AS A REMEDY FOR RACIAL GERRYMANDERING OF CONGRESSIONAL DISTRICTS AND DEPRIVES BLACK DELTA VOTERS OF AN EQUAL OPPORTUNITY TO ELECT CANDIDATES OF THEIR CHOICE.

In Mississippi's November 2 general election black candidate Robert G. Clark, who won the August Democratic primary in the District Court-ordered Second Congressional District, was defeated by white Republican nominee Webb Franklin, a former state court judge, in a

three-way race for the U.S. House of Representatives.[1] The third candidate also was white. Clark's defeat makes it crystal clear that the District Court's congressional redistricting plan which is the subject of this appeal is totally inadequate to remedy the Attorney General's Section 5 objection to the Mississippi Legislature's "least change" plan (J.S., App. B, pp. 25a-29a), fails to remedy 16 years of racial gerrymandering of congressional district lines in Mississippi (J.S., pp. 16-23), and fails to provide black voters in the Delta area with an equal opportunity to elect candidates of their choice.

The state official defendants, in arguing that the questions presented in this appeal are unsubstantial, have relied heavily on Clark's August primary victory to show that Mississippi's "impact theory" (that two congressional districts should be 40% or more black), adopted by the District Court, "provides an opportunity to elect a black Congressman from District 2 without sacrificing the political effectiveness of blacks in District 4" (Motion to Dismiss or Affirm, p. 6). Clark's defeat shows that this "impact theory" is nothing more than a subterfuge for continued racial gerrymandering and fails to provide the relief to which Mississippi's black voters are entitled in this case.

Press reports show that the District Court's creation of a razor-thin 53.77% black population majority in the Second District (but white voting age population and registered voter majorities) merely highlighted the racial element in the campaign and virtually guaranteed that no black candidate, or other candidate supported by the black voting majority, would get elected. The Second Dis-

---

[1] The complete, but unofficial returns as reported in the Jackson press are as follows:

Webb Franklin	73,588 (50.2%)
Robert G. Clark	71,335 (48.7%)
William V. Harris	1,601 (1.1%)

(Jackson) *Clarion-Ledger*, November 4, 1982, p. 1B.

trict contest was "really a race about race." [2] Franklin's campaign consisted of an unabashed appeal to the white voting majority on the basis of race. A tag line on one of Franklin's television commercials proclaimed: "Elect Webb Franklin to Congress. He's one of us." [3] In another television commercial which opened and closed with a view of the Confererate monument in Greenwood, Franklin said:

> You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. We welcome the new, but we must never, ever forget what has gone before. We cannot forget a heritage that has been sacred through our generations.[4]

This ad was attacked by the state's Democratic leadership as an effort "to inflame racial passion." [5] The white winner also took the unusual step of putting Clark's picture in his fliers and newspaper supplements. One leading campaign adviser told a *New York Times* reporter that "the pictures were being used to remind voters that Mr. Clark was black." [6]

Clark lost despite the fact that Gov. William Winter and virtually the entire state Democratic Party leadership endorsed his candidacy and actively campaigned for him. Clark also won endorsements from the state AFL-

---

[2] "Mississippi Race, Whatever They Say, Is About Race," *New York Times*, October 14, 1982, p. B12.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* Franklin's racial appeals to white voters also are discussed in "2d Congressional District: Robert Clark/Webb Franklin," *Clarion-Ledger-Jackson Daily News*, October 17, 1982, p. 1I; "It was inevitable that race issue would sneak into 2nd District," *Clarion-Ledger-Jackson Daily News*, October 17, 1982, p. 3I.

CIO and was backed by state teachers organizations (Clark is chairman of the state House of Representatives Education Committee). He also campaigned heavily for white votes.[7]

The voting results further prove beyond doubt the stipulation entered in evidence (J.S., pp. 7-8; quoted in Brief Opposing Motion to Dismiss or Affirm, p. 8) that strict racial bloc voting continues to prevail in Mississippi elections. The election results—50.2% for Franklin, 48.7% for Clark—closely approximate the white and black voting age population percentages for the court-ordered Second District (J.S., p. 6 n.4). The precinct voting patterns show that white Democrats carried the Delta counties for Senator John Stennis, the white Democratic senatorial candidate, but crossed over to vote for Franklin against Clark.[8] Senator Stennis received 84,475 votes in the Second District against Republican nominee Haley Barbour, showing that Democratic voters still predominate. However, 13,140 Democratic voters switched to Franklin, the Republican nominee, in the congressional race,[9] showing that race is still more important than party loyalty in Mississippi voting. White

---

[7] The *Jackson Daily News* reported (November 2, 1982, p. 10A):

> And, like his opponent—the 40-year-old Franklin—Clark has geared his campaign strategy toward getting out the white vote.
>
> In Clark's television ads, white state Rep. H.L. "Sonny" Meredith of Greenville and Sen. Robert Crook of Ruleville talk of Clark's outstanding record in the Legislature. In another ad, the 54-year-old Clark discusses his farm policy with four white Delta farmers in front of a tractor.
>
> In addition to endorsements of party leaders, like Gov. William Winter, Clark appears to have won the blessings of some white Delta farmers. Last week about 40 farmers came to a Clark reception given by Hiram Eastland, cousin of former Sen. James O. Eastland, in Doddsville.

[8] (Jackson) *Clarion-Ledger*, November 3, 1982, p. 1A.

[9] (Jackson) *Clarion-Ledger*, November 4, 1982, p. 8B.

voters interviewed by the Jackson *Clarion-Ledger* were candid about the basis for their votes:

> Barry McCrew, a 23-year old white catfish farmer from Yazoo City, said he voted for Webb Franklin "because I don't want a black man in Congress. I don't know many whites that are going to vote for him [Clark]."
>
> Mrs. Herbert Bond, a white 41-year-old Yazoo City housewife, said the choice in the 2nd District was simple.
>
> "Franklin was my choice, she said. "I just don't want to see a black man in that position." [10]

In its post-election analysis, the *Clarion-Ledger* acknowledged in an editorial: "Yes, race was a factor—maybe THE factor." [11]

Clark, a four-term state legislator, was the overwhelming choice of the black voters. Clark carried all the majority black Delta counties, except three,[12] but lost heavily in predominantly white precincts and in the six predominantly white, east-central Hill counties (See J.S., p. 25 n.13).[13]

Given the high degree of racial bloc voting prevalent in Mississippi—to which the state has stipulated—the addition by the District Court of the six heavily white counties from the east-central Hills area—Attala, Carroll, Choctaw, Leake, Montgomery, and Webster—to the majority black Delta counties in the Second District

---

[10] (Jackson) *Clarion-Ledger*, November 3, 1982, p. 6B.

[11] (Jackson) *Clarion-Ledger*, November 4, 1982, p. 18A.

[12] *Jackson Daily News*, November 3, 1982, p. 2B. Some press reports stated that a low black turnout was a factor in Clark's defeat because he lost Leflore and Sunflower counties, two majority black Delta counties. However, these counties do not have black countywide voting majorities, as indicated by the total absence of black officials elected on a countywide basis. Black turnout was, in fact, the highest in any mid-term Mississippi congressional election.

[13] *Id.*

spelled the defeat of Clark and any other candidate favored by the black voters. Without these six counties, Clark would have won with over 51% of the vote.[14] These voting results prove our contentions on appeal, not only that the District Court erred in deferring to the state's racial policy of establishing two 40% black or better districts, but also that the District Court violated the mandate of *Connor* v. *Finch*, 431 U.S. 407, 424-25 (1977), by stacking the Second District against the black Delta majority by including these heavily white Hill counties (J.S., pp. 23-27).

---

[14] The election returns as compiled from reports in the Jackson press (*Jackson Daily News*, November 3, 1982, p. 2B) show as follows (votes for the third candidate, William V. Harris, were excluded from the press report):

Delta Counties	Clark	Franklin
Bolivar	7,055	5,964
Coahoma	4,909	4,605
Holmes	5,320	2,395
Humphreys	2,484	2,108
Issaquena	464	324
Leflore	5,637	6,721
Madison	6,867	5,349
Quitman	1,808	1,361
Sharkey	1,437	1,018
Sunflower	3,941	4,091
Tallahatchie	273	235
Tunica	1,273	1,064
Warren	5,596	8,053
Washington	8,380	8,224
Yazoo	4,457	4,948
	59,901	56,460
Hill Counties		
Attala	3,034	3,892
Carroll	1,536	2,280
Choctaw	1,104	1,992
Leake	2,526	3,246
Montgomery	2,027	3,006
Webster	1,207	2,712
	11,434	17,128

Clark's defeat provides an additional reason why this Court should intervene to protect the voting rights of black Mississippi voters from dilution based upon deference to the discriminatory redistricting policies of the State of Mississippi. This case presents a key test of the scope of the remedial powers of District Courts to remedy discriminatory state policies found by the Attorney General to be objectionable under the Voting Rights Act. The District Court's unwarranted deference to those discriminatory state policies should be reversed.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction, and paragraph 3 of the District Court's judgment ordering into effect the Simpson Plan as a court-ordered plan should be reversed.

Respectfully submitted,

WILLIAM L. ROBINSON
FRANK R. PARKER
PATRICIA M. HANRAHAN
ROBERT B. MCDUFF
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

Attorneys for Appellants *

* Appellants acknowledge the assistance of Samuel Issacharoff, a student at Yale Law School, in the preparation of this brief.

Office - Supreme Court, U.S.
FILED
SEP 10 1982
STEVAS,
CLERK

No. 82-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

OWEN H. BROOKS, *et al.*, *Appellants*,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees/Cross-Appellants.

On Appeal From The United States District Court For The Northern District Of Mississippi

MOTION TO DISMISS OR AFFIRM

WILLIAM ALLAIN
Attorney General, State of Mississippi

*JERRIS LEONARD
KATHLEEN HEENAN
JERRIS LEONARD & ASSOCIATES, P.C.
900 17th Street, N.W., Suite 1020
Washington, D.C. 20006
(202) 872-1095

CHAMP TERNEY
HUBBARD T. SAUNDERS, IV
NICKI MARTINSON
1164 Deposit Guaranty Plaza
Jackson, Mississippi 39201

R. SCOTT LEVANWAY
727 N. President Street
Jackson, Mississippi 39202

Attorneys for Appellees/Cross-Appellants
**Counsel of Record*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION	1
STATEMENT OF THE CASE	1
THE APPEAL PRESENTS NO SUBSTANTIAL QUESTION	5
I. The Primary Election Conducted Under The Interim Plan Refutes Many Of The Appellants' Factual Allegations	5
II. The District Court Properly Exercised Its Remedial Authority Within The Boundaries Defined by *Upham*	7
A. The doctrine of res judicata precludes the relitigation of the constitutionality of the 1966 configuration	7
B. No adjudicated violation of the Voting Rights Act precluded the court's deference to the state policy of maintaining two impact districts	9
III. No Racial Minority Group Has A Constitutional Or Statutory Right To A 65% District.	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES:	Page
Beer v. *United States*, 427 U.S. 130 (1976)	12
City of Mobile v. *Bolden*, 446 U.S. 55 (1981)	11
City of Richmond v. *United States*, 422 U.S. 1 (1975)	12
Connor v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967)	2, 3, 7, 8
Connor v. *Waller*, 421 U.S. 656 (1975)	3
Dotson v. *City of Indianola*, 521 F. Supp. 934 (N.D. Miss. 1981)	3
Federated Department Stores v. *Moitie*, 452 U.S. 394 (1981)	8
Mississippi v. *Smith*, Civil No. 82-0956 (D.D.C. filed April 7, 1982)	4, 5, 9
Mississippi v. *United States*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980)	11
Morris v. *Gressette*, 432 U.S. 491 (1977)	3
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979)	8
Sixty-Seventh Minnesota State Senate v. *Beens*, 405 U.S. 187 (1972)	11
Upham v. *Seamon*, ___ U.S. ___ (1982)	5, 7, 9
Whitcomb v. *Chavis*, 403 U.S. 124 (1971)	12
White v. *Regester*, 412 U.S. 753 (1973)	11
White v. *Weiser*, 412 U.S. 783 (1973)	7

CONSTITUTIONAL PROVISIONS AND STATUTES:	
U.S. Const. Amend. XIV, § 5	*passim*
U.S. Const. Amend. XV	7
42 U.S.C. § 1973c (1965)	2-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-233

OWEN H. BROOKS, *et al.*, *Appellants*,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees/Cross-Appellants.

**On Appeal From The United States District Court
For The Northern District Of Mississippi**

MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the questions presented are so unsubstantial as not to need further argument.[1]

STATEMENT OF THE CASE

In August, 1981, the Legislature of the State of Mississippi enacted S.B. 2001, 1981 Mississippi Laws, Extraordinary Session, Chapter 8, to achieve population equality among Mississippi's Five Congressional districts, based on the 1980 Census data. Two facts regarding the enactment of S.B. 2001, omitted from the Appellants'

[1] This Motion is filed on behalf of Appellees/Cross-Appellants, William F. Winter, Governor; William A. Allain, Attorney General; and Edwin Lloyd Pittman, Secretary of State; in their official capacities as members of the Mississippi State Board of Election Commissioners.

Jurisdictional Statement, are essential to an understanding of the State's position. First, the State through the Joint Senate-House Committee for Congressional Redistricting (Miss. Code Ann. §§ 5-3-121, *et seq.* (Supp. 1981)) drafted, discussed, and ultimately enacted S.B. 2001 in the full view of the invited news media and public. The legislative process began with a series of out-reach hearings intended to inform the Committee of the views of the citizenry. All committee meetings were open and all files and records were continually available for inspection. Public participation was solicited and encouraged and the openness of the process as compared to other states, or indeed to any standard, was extraordinary.

Secondly, the State leadership embarked on its redistricting mission with the expressed goal of complying with Constitutional and statutory standards. The Redistricting Committee retained special outside counsel to advise members and staff of federal requirements. With the advice of counsel, the Committee relied in good faith on the fact that the existing district lines had the imprimatur of the Supreme Court and the Attorney General. The same district configuration was the subject of a constitutional challenge in 1966. The district court upheld the plan and the Supreme Court affirmed. *Connor v. Johnson*, 279 F.Supp. 619 (S.D. Miss. 1966), *aff'd* 386 U.S. 483 (1967). The 1972 plan, (Miss. Code Ann. § 23-5-233 (1972)), re-enacted the 1966 lines with slight adjustments to accommodate population shifts and the Attorney General precleared the State's submission under Section 5 of the Voting Rights Act. (Letter of David Norman to A.F. Summer, May 30, 1972 at Appendix A.)[2]

---

[2] The Appellants have challenged the conclusiveness of the 1972 preclearance and this is one of the central disputes in the Section 5 litigation. The Appellants contend that because the Attorney Gener-

These prior determinations of validity under the Fourteenth and Fifteenth Amendments and the Voting Rights Act guided the Committee and the Legislature and were

---

al deferred to the ruling of the district court in *Connor* v. *Johnson*, 279 F. Supp. 216 (S.D. Miss. 1966), he neglected his statutory duty to undertake an independent review of the 1972 plan and consequently his preclearance is now retractable.

In *Morris* v. *Gressette*, 432 U.S. 491 (1977), however this Court stated categorically that the Attorney General's reasons for objection or approval are immaterial to the efficacy of a preclearance once 60 days has elapsed:

> According to the terms of § 5, a covered jurisdiction is in compliance . . . once it has (i) filed a complete submission with the Attorney General, and (ii) received no objection from that office within 60 days . . . [I]mplementation of changes in voting laws is not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect. To the contrary, compliance with § 5 is measured solely by the *absence*, for whatever reason of a timely objection on the part of the Attorney General.

432 U.S. 491, 503 (1977) (emphasis in original and footnotes omitted).

The appellants further argued that the Attorney General misunderstood the law. The Attorney General thought he was required to defer to federal court decisions, while in fact, as *Connor* v. *Waller*, 421 U.S. 656 (1975), made clear, the Attorney General is not bound by a district court's decision on constitutionality. In the view of the *Morris* Court, this did not add any weight to the appellants position:

> The record is clear that the Attorney General reviewed the submitted legislation as well as the judicial determination in *Twiggs* v. *West*, and *decided* not to interpose an objection . . . That decision may have been erroneous . . . but it nonetheless was a decision exercised pursuant to the Attorney General's § 5 responsibilities.

432 U.S. at 507 n.24. *Accord*, *Dotson* v. *City of Indianola*, 521 F. Supp. 934, 941-43 (N.D. Miss. 1981).

Apparently, the Attorney General's policy of deferring to district court determinations of constitutionality was applied to Mississippi in 1972; at least this was the reason stated by Assistant Attorney General Norman. Whether it was the true motivation behind the

certainly the single most compelling reason for the "least changes" approach which was ultimately embodied in S.B. 2001. Appellants' contention that S.B. 2001 "is rooted in purposeful discrimination" is factually inaccurate. (Jurisdictional Statement, at 16.) The roots of S.B. 2001 lie in purposeful maintenance of *proven* compliance with federal requirements. It is precisely because Section 5 purports to scrutinize *change* in voting standards, practice, or procedures that the Legislature took the conservative approach of *least* change from the existing districts, rather than risk an inadvertent mistake in some unchartered region.

Having acted diligently and in good faith in conforming its legislative actions to the requirements of the Voting Rights Act, the State's only omission was a failure to retain a medium to predict the whimsical changes in the Department of Justice's administration of Section 5 which resulted in the Attorney General's objection to S.B. 2001. J.S. App. 27a.

When the objection letter of Assistant Attorney General Reynolds was received, the State leadership decided to litigate the validity of the Legislature's plan. An action for declaractory judgment was filed in the District Court for the District of Columbia on April 7, 1982. *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C.) The State has noticed an interlocutory appeal to this Court from the

---

failure to object or whether some other political exigencies influenced the decision is inapposite. The relevant facts are that the state staisfied its obligation of submission and no objection was interposed. For whatever reason no objection was made in 1972, the issue of the plan's validity under Section 5 was finally decided 60 days after submission.

three-judge court's denial of their motion for Summary Judgment.[3]

It is this background of the State's good faith and the pending Section 5 litigation which distinguishes *Upham* v. *Seamon*, ____ U.S. ____ (1982), and renders the Appellants' questions unsubstantial.

THE APPEAL PRESENTS NO SUBSTANTIAL QUESTION

I. The Primary Election Conducted Under The Interim Plan Refutes Many Of The Appellants' Factual Allegations

The unsubstantiality of the questions presented by the Appellants' appeal has been dramatically exposed by the primary elections conducted under the district court's interim plan. The Appellants contend that the court-ordered interim "Simpson" plan which contains a 53.7% black district, denies black voters an opportunity to elect candidates of their choice insofar as it allegedly would require a Congressional district with a black majority of at least 65% to elect a black.[4] In the August 17, 1982 primary, Robert Clark, a black State Legislator, won the Democratic Congressional nomination in the Second District over three white candidates. Mr. Clark carried over 57% of the votes cast—more than the number of votes

---

[3] The standards to be applied in judging a redistricting plan's compliance with the "effect" test under Section 5 constitutes the subject matter of the State's appeal to this Court in *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C. June 28, 1982), to be docketed on or before September 27, 1982. The opinion of the district court for the District of Columbia is at J.S. App. 31a.

[4] All of the witnesses for appellants, including their expert, Senator Kirksey, testified that the Simpson plan did not provide an opportunity to elect a black Congressman. Tr. 91, 109, 272.

received by the other candidates combined.[5] Moreover, the State's Senior United States Senator, John Stennis, the incumbent Second District Congressman, David Bowen, the Governor and other state and party leaders have publicly endorsed Mr. Clark for the November election. These results are entirely irreconcilable with the Appellants' contentions that strict racial bloc voting and lack of party support for black candidates prevail in Mississippi.

The primary result in the Second District also discredits the Appellants' statement that the Legislature preference for two impact districts was discriminatory *per se*, because it allegedly precluded election of a black Congressman. (J.S. at 24-5). The impact theory, as embodied in the Simpson plan, provides an opportunity to elect a black Congressman from District 2 without sacrificing the political effectiveness of blacks in District 4.

In addition, the Simpson plan guarantees responsive representation of the black voters in Districts 2 and 4, whatever the outcome of the November elections, because of the built-in symbiosis between accountability to the black electorate and re-election. Mr. Clark's primary victory demonstrates that a district with a black voting age population under 50%, J.S. at 6 n. 4, can elect a black, which accomplishes the goal sought by the Appellants

---

[5] The vote tally as reported in the Jackson *Clarion-Ledger*, August 18, 1982, at 1, was as follows:

Democrats:	Robert Clark	36,257
	Pete Johnson	14,298
	Ollie Mohamed	8,802
	Ed Jackson	4,463
Republicans:	Webb Franklin	7,124
	Clennon King	90

without their repugnant gerrymander and without sacrifice of black political power in another district.

II. The District Court Properly Exercised Its Remedial Authority Within The Boundaries Defined by Upham

This Court's decision last term *Upham* v. *Seamon*, ___ U.S. ___ (1982), reiterated established principles which should guide district courts in fashioning interim relief in redistricting cases. Consistent with precedents, *Upham* states that the courts' exercise of remedial power must be circumscribed by specific constitutional or statutory infirmities. *White* v. *Weiser*, 412 U.S 783 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *Sixty-Seventh Minnesota State Senate* v. *Beens*, 405 U.S. 187 (1972). The judiciary can substitute neither its own, nor a plaintiff's constitutionally superfluous preferences for those of the Legislature. Any state policy, consitutionally and statutorily legitimate, must be respected by the district court.

The plaintiffs below sought not only the reestablishment of a Delta district, but one gerrymandered to recapture lost black population. To justify this remedy they attempted to prove the constitutional deficiency of the basic configuration of S.B. 2001 first adopted in 1966, and the statutory deficiency of S.B. 2001, based on the objection interposed by the Attorney General earlier this year.

A. The doctrine of res judicata precludes the relitigation of the constitutionality of the 1966 configuration

The dispute as to the constitutional validity of the basic configuration of S.B. 2001 was finally adjudicated in *Connor* v. *Johnson*, 279 F.Supp. 620 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967). In that case, the same parties litigated the issue of whether the east-west lines across the Delta violated the Fourteenth and Fifteenth Amend-

ments. The district court concluded that the plaintiffs had failed to prove either the intent or effect of racial discrimination. 279 F.Supp. at 623-24. On appeal to this Court the same question was squarely presented:

> Whether the congressional district lines drawn by the 1966 session of the Mississippi legislature, which deliberately or otherwise, have a racially discriminatory effect, violate the Fourteenth and Fifteenth Amendments to the Constitution.

Connor v. *Johnson*, Jurisdictional Statement, at p. 2, Tr. Exhibit C-1, Binder 5, Attachment V.

Recently in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), this Court wrote:

> "There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutory principle of res judicata."

452 U.S. at 396.

The *Connor* decision forever settled between the parties the issue of whether there was a constitutional obligation to draw a Delta district in the 1966 Congressional redistricting plan. The Appellants cannot relitigate that case nor can they retry the same issue as it relates to S.B. 2001. Under the companion doctrine of collateral estoppel, "the judgment in a prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n. 6 (1979). Thus, the court below did not and could not have concluded that there was a constitutional obligation to incorporate a Delta district in the 1980 redistricting. Constitutional justification for the relief sought was wholly lacking from the Appellants' case.

B. No adjudicated violation of the Voting Rights Act precluded the court's deference to the state policy of maintaining two impact districts

The Appellants incorrectly rely on *Upham* for the proposition that the district court failed to rectify those aspects of state policy which gave rise to the objection to S.B. 2001. In *Upham* the Texas Legislature accepted the Attorney General's objection letter as the final determination of the validity of the plan in question under Section 5. That letter constituted the final adjudication of Section 5 compliance. The Texas district court, therefore, was bound to specifically address the deficiencies identified therein.

In the present case, however the State decided to pursue a declaratory judgment as to S.B. 2001 in the District Court for the District of Columbia. *Mississippi v. Smith*, Civil No. 82-0956 (D.D.C.). That action was pending at the time the court below entered its order. Thus no violation of the Voting Rights Act has ever been adjudicated and the statutory validity of S.B. 2001 remains undetermined.

In deciding what, if any, interim relief was appropriate the district court was faced with a choice between the nondispositive letter of the Attorney General and the overwhelming evidence that the Legislature had acted in complete good faith in enacting S.B. 2001. To adopt the Attorney General's preliminary findings would have denied the State its statutory right to a full and fair adjudication of the plan's conformance to the requirements of the Voting Rights Act. Moreover, the objection was based on an arbitrary legal standard of which the State had no advance notice. The Attorney General's first notice to any covered jurisdictions that discriminatory effect could be measured against some benchmark other

than existing voting strength came 60 days after Mississippi's submission of S.B. 2001.[6] Letter of William Bradford Reynolds, January 11, 1982, at Appendix B. Further adding to the district court's dilemma was the fact that the alleged racial policy to which the Appellants and the Attorney General objected had been precleared by the Attorney General in 1972.

On the other hand, the State's evidence showed that the Legislature had endeavored to comply with the procedural and substantiave requirements of Section 5. In the light of the State's unassailable good faith, there was no compelling reason to disrupt its long-standing political program to the degree proposed by the Kirksey plan. The Attorney General's position on S.B. 2001, by virtue of its uncertainty, inconsistency and structural weakness, argues *against* interference with the Legislature's plan prior to a trial de novo in the Section 5 court.

III. No Racial Minority Group Has A Constitutional Or Statutory Right To A 65% District.

At the foundation of the Appellants' appeal lies the contention that the black citizens of Mississippi have a constitutional right and a statutory entitlement to a 65% black Congressional district. The Appellants seem to argue that since the Constitution and Voting Rights Act guarantee minority voters an opportunity to elect candidates of their choice, and since, according to their reckoning, it would require black majority of at least 65% to

---

[6] On January 11, 1982, Counsel for the State received a letter requesting information regarding redistrictings prior to the 1972 preclearance. None of the requested information is required by the regulations describing the contents of Section 5 submissions. *See* 28 C.F.R. §§ 51.25, *et seq.*

actually elect a black Congressman, the Constitution and Voting Rights Act guarantee black voters a 65% district.

However, guaranteed safe seats for racial minorities are simply not the law. The Fifteenth Amendment does not entail the right to have Negro candidates elected. *City of Mobile* v. *Bolden*, 446 U.S. 55, 59 (1980). The Constitution and the Voting Rights Act do guarantee that black citizens will have equal access to the political process and an equal opportunity to elect candidates of their choice. *City of Mobile*, 446 U.S. at 59; *White* v. *Regester*, 412 U.S. 753, 776 (1973). While the law prohibits measures or practices which "cancel out or minimize the voting strength of racial groups," *White* v. *Regester*, 412 U.S. at 765, it does not ensure any group a right to be represented in proportion to their numbers. *City of Mobile*, 446 U.S. at 59.

In *Mississippi* v. *United States*, the District of Columbia Court reached this conclusion of law:

> "No state or political subdivision is required to search for ways to maximize the number of black voting age population districts. Likewise, no racial group has a constitutional right to an apportionment structure designed to maximize its political strength."

490 F.Supp. 569, 582 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980). The Constitution and Voting Rights Act guarantees opportunity and access, not guaranteed efficacious results.

Just as there is no basis in the law to support the Appellants' claim for a 65% district, neither is there any justification in demographic fact. Both the 1970 and 1980 census reports show a decreased population in the Delta and a decline in the percentage of the total Delta population comprised of blacks. The Delta District, which was 59.29% black in 1960 is only 48.09% black today. J.S. App.

15a. The Delta district is a phantom and this is nowhere more clearly illustrated than in the Kirksey plans proposed to the district court. These maps reach far beyond the Delta area, the geographical integrity of which their proponents claim to preserve, into the urban population of Jackson in order to bolster the black electoral base of District 2. The Kirksey proposals are blatant racial gerrymanders which seek to maximize the electoral strength of black voters in contravention of the Court's pronouncements on this topic. *Beer* v. *United States*, 427 U.S. 130 (1976); *City of Richmond* v. *United States*, 422 U.S. 1 (1975); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). The Legislature validly rejected this gerrymander and there was no constitutional or statutory compulsion on the district court to accept it either.

CONCLUSION

Wherefore, Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and therefore

move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered by the District Court for the Northern District of Mississippi.

Respectfully submitted,

WILLIAM ALLAIN
Attorney General, State of Mississippi

*JERRIS LEONARD
KATHLEEN HEENAN
JERRIS LEONARD & ASSOCIATES, P.C.
900 17th Street, N.W., Suite 1020
Washington, D.C. 20006

CHAMP TERNEY
HUBBARD T. SAUNDERS, IV
NICKI MARTINSON
1164 Deposit Guaranty Plaza
Jackson, Mississippi 39201

R. SCOTT LEVANWAY
727 N. President Street
Jackson, Mississippi 39202

Attorneys for Appellees/Cross-Appellants
**Counsel of Record*

APPENDIX A

MAY 30 1972

Honorable A. F. Summer
Attorney General
State of Mississippi
The State Capitol Building
Jackson, Mississippi 39201

Dear Mr. Attorney General;

This is in response to your submission, on behalf of the State of Mississippi, of House Bill 448, the recently passed reapportionment of Mississippi's five Congressional seats. This submission was made pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

The Attorney General will not object to House Bill 448. The basis of this decision is our reading of *Connor* v. *Johnson*, 279 F. Supp. 620 (U.S. Miss. 1966). *affirmed*, 386 U.S. 483 (1967), in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state. Because we feel bound by the decisions of the courts in that case, we do not interpose an objection.

We trust that you are aware that, as Section 5 provides, our present failure to object does not bar future litigation regarding House Bill 448's Fifteenth Amendment implications before the courts. Nor should this letter be construed as an approval of the one person, one vote implications of House Bill 448, under *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), because the Attorney General does not have jurisdiction under Section 5 to determine such issues.

Sincerely,

DAVID L. NORMAM
Assistant Attorney General
Civil Rights Division

APPENDIX B

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 11, 1982

Jerris Leonard, Esquire
Jerris Leonard & Associates
Suite 1020
900 Seventh Street, N.W.
Washington, D. C. 20006

Dear Mr. Leonard:

This is in reference to Senate Bill No. 2001 (1981), providing for the reapportionment of the Mississippi Congressional districts, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on November 10, 1981.

We have given careful consideration to all of the forwarded materials as well as to other information available to us. In the course of our evaluation, we found it necessary to focus once again on the State's reapportionment of 1966 which adopted a district configuration that fragmented the Mississippi Delta area into three districts. As you know, that 1966 plan was never submitted for Section 5 preclearance. However, a federal district court, in a constitutional challenge to the plan, sustained it on the ground that plaintiffs had failed to carry their burden of proving purposeful discrimination pursuant to the Fifteenth Amendment. *Connor* v. *Johnson*, 270 F. Supp. 619 (S.D. Miss. 1966), aff'd, 386 U.S. 483 (1967).

When the State reapportioned in 1972, following the 1970 Census, the State submitted the 1972 plan to the Attorney General pursuant to Section 5. That plan essentially followed adopted in 1966. The Attorney General determined, based on

the then prevailing decisional law (*Connor* v. *Johnson*, 402 U.S. 690, 691 (1971)) that he was bound by the district court's earlier Connor decision to preclear the 1972 plan without undertaking an independent evaluation of it to determine whether it satisfied Section 5 requirements.

Subsequent decisions of the United States Supreme Court have made it clear that any reapportionment plan enacted by a covered state must be subject to an independent review under Section 5 without regard to whatever judicial scrutiny that plan may undergo. See *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Finch*, 431 U.S. 407 (1977); *McDaniel* v. *Sanchez*, Sup. Ct. No. 80-180, decided June 1, 1981. Consequently, were we to cosider the 1972 plan today we would be compelled to review that plan on its merits under the purpose/effect standard of Section 5 rather than forego that analysis in deference to the district court's 1966 decision.

This raises the troublesome question with regard to the present submission as to whether the proper comparison is with the State reapportionment in 1972, which has never been tested under Section 5, with the State reapportionment in 1966, which also has never been tested under Section 5, or with the pre-1966 State reapportionment, which was in effect at the time the Voting Rights Act was adopted. In order to resolve this question in a meaningful way and on a fully informed basis, it is necessary that we receive from you additional information regarding you submission. Specifically, we request, as I discussed with you today by telephone; that you provide us with an analysis of the district or districts in the Delat area as configured in 1965, in 1966 after reapportionment, and in 1972 after reapportionment, including population statistics as determined by the 1960 Census, the 1970 Census and the 1980 Census.

As soon as this information is provided to use we will undertake to complete our assessment of the current submission on

an expedited basis and will meet with you promptly to discuss the analysis provided.

Sincerely,

/s/ Wm. Bradford Reynolds
WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS
CLERK

No. 82-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, *Governor, et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

WILLIAM L. ROBINSON
FRANK R. PARKER *
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway St.
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

ROBERT BRUCE MCDUFF
RATNER & SUGARMON
Suite 525
Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

Attorneys for Appellants

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE FACT THAT A BLACK CANDIDATE HAS WON THE SECOND DISTRICT DEMOCRATIC PRIMARY DOES NOT NEGATE APPELLANTS' CLAIMS OF DILUTION OF BLACK VOTING STRENGTH IN THE COURT-ORDERED PLAN	3
II. DEFENDANTS' ARGUMENT THAT THE DISTRICT COURT WAS REQUIRED TO ADHERE TO THE STATE'S RACIAL REDISTRICTING POLICY BECAUSE THE ATTORNEY GENERAL'S SECTION 5 OBJECTION WAS "NONDISPOSITIVE" SHOULD BE REJECTED	6
III. PLAINTIFFS' PROPOSED COURT-ORDERED REDISTRICTING PLANS WERE JUSTIFIED BY THE FACTS OF THIS CASE	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page
Burton v. *Hobbie*, Civil No. 81-617-N (M.D. Ala. June 21, 1982) (three-judge court)	2
Busbee v. *Smith*, Civil No. 82-0665 (D.D.C. May 24, 1982) (three-judge court), *stays denied*, No. A-1018 (May 25, 1982 and June 1, 1982)	6, 7
Canady v. *Lumberton*, 454 U.S. 957 (1981)	6
City of Rome v. *United States*, 446 U.S. 156 (1980)	7
Cross v. *Baxter*, 604 F.2d 875 (5th Cir. 1979)	4
Hathorn v. *Lavorn*, —— U.S. ——, 72 L.Ed.2d 824 (1982)	7
Jordan v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court)	1
Kirksey v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977)	8
McIntosh County Branch of NAACP v. *City of Darien*, 605 F.2d 753 (5th Cir. 1979)	4
Terrazas v. *Clements*, 537 F. Supp. 514 (N.D. Tex. 1982) (three-judge court)	2
Perkins v. *City of West Helena, Arkansas*, 675 F.2d 201 (8th Cir. 1982), *aff'd mem.*, 51 U.S. L.W. 3252 (U.S. October 4, 1982)	3
Perkins v. *Matthews*, 400 U.S. 379 (1971)	7
Sims v. *Amos*, 365 F. Supp. 215 (M.D. Ala. 1973) (three-judge court)	7
United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977)	8
United States v. *Board of Supervisors of Forrest County*, 571 F.2d 51 (5th Cir. 1978)	4
United States v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 652 (1977)	6
Upham v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982)	1, *passim*
Wise v. *Lipscomb*, 347 U.S. 535 (1978)	7
Yelverton v. *Driggers*, 370 F. Supp. 612 (S.D. Ala. 1974)	4

TABLE OF AUTHORITIES—Continued

Page

Zimmer v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1975) 3

Other Authorities

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) 5
S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Admin. News 774 7
(Jackson) *Clarion-Ledger*, Aug. 18, 1982 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-233

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, *Governor, et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

---

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

The crux of this appeal is that, having acknowledged the Attorney General's ruling that the state's congressional redistricting plan (S.B. 2001) violates Section 5 of the Voting Rights Act, *Jordan* v. *Winter*, 541 F. Supp. 1135, 1141-42, the District Court was without authority to disregard that objection and the clear statutory mandate of Congress by ordering into effect a court plan which defers to the objected-to state racial policy embodied in S.B. 2001.

This case is part of the judicial fallout of *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982), and presents important questions raised, but not resolved, by that decision. In *Upham*, this Court affirmed the decision of the District Court to correct portions of the plan to

which the Attorney General objected, but directed the District Court to defer to those district boundaries to which the Attorney General did not object.

The *Upham* decision has created widespread confusion among the lower courts regarding the scope of their remedial authority to correct Section 5 violations. In this case, the District Court felt compelled by the *Upham* mandate to adhere to the state's "political program" to adopt an alternative congressional redistricting which incorporates the state's racial redistricting policy—the creation of majority white districts which are 40% or better black—to which the Attorney General objected. In two other cases, *Burton* v. *Hobbie*, Civil No. 81-617-N (M.D. Ala. June 21, 1982) (three-judge court), and *Terrazas* v. *Clements*, 537 F. Supp. 514 (N.D. Tex. 1982) (three-judge court), District Courts actually adopted districts to which the Attorney General had objected under Section 5. For the minority citizens of these covered jurisdictions, as for the appellants in the present case, these District Court actions have undermined the important statutory protections of the Voting Rights Act and deprived minority citizens of a judicial remedy for Voting Rights Act violations.

In responding to our Jurisdictional Statement, the state official defendants (1) contend that the fact that a black candidate has won the Democratic primary in the court-ordered Second District vitiates appellants' claims of dilution (Motion to Dismiss or Affirm, pp. 5-6); (2) argue that the District Court's adoption of the objected-to state racial redistricting policies is consistent with *Upham* because there was no adjudicated Section 5 violation in this case (*id.*, pp. 7-10); and (3) make the irrelevant and inflammatory contention that appellants claim a constitutional and statutory right to a 65% black district (*id.*, pp. 10-12). Defendants' arguments in their Motion to Dismiss or Affirm clearly indicate that this appeal raises substantial and recurring questions

which should be resolved by this Court upon plenary consideration. However, defendants' contentions fail to provide a basis for summary affirmance or dismissal of this appeal.

I. THE FACT THAT A BLACK CANDIDATE HAS WON THE SECOND DISTRICT DEMOCRATIC PRIMARY DOES NOT NEGATE APPELLANTS' CLAIMS OF DILUTION OF BLACK VOTING STRENGTH IN THE COURT-ORDERED PLAN.

Defendants concede that the Second District in the court-ordered plan is white majority in voting age population and registered voters. Motion, p. 6. The mere fact that a black candidate, state Rep. Robert Clark, has won the Democratic primary, even if he wins the general election in November, does not as a matter of law preclude a finding of unlawful dilution of black voting strength. *Perkins* v. *City of West Helena, Arkansas*, 675 F.2d 201 (8th Cir. 1982), *aff'd mem.*, 51 U.S.L.W. 3252 (U.S. October 4, 1982); *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1975).[1] This

---

[1] In *Zimmer* the court held (485 F.2d at 1307):

> While acknowledging that the instant facts might theoretically present a case of dilution, appellee argued that 1971 and 1972 elections under the at-large plan, with the attendant success of 3 black candidates, dictated a finding that the at-large scheme did not in fact dilute the black vote. The significance attached to success at the polls in the instant case is unavailing, however, for two reasons. First, these results were not before the district court when it rendered the opinion we are presently reviewing. It is axiomatic that an appellate court cannot take cognizance of matters not passed upon by the trial court. Second, we cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that

principle has been recently endorsed by Congress in extending the protections of the Voting Rights Act and in amending Section 2 of the Act to incorporate a "results" test. In discussing the criteria to be applied by courts in implementing the new Section 2 "results" test, the Senate Report states:

> The fact that no members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote", in violation of this section. *Zimmer* 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section, e.g., by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution . . . . Instead we shall continue to require an independent consideration of the record." *Ibid.*

---

the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record.

The proposition that the election of black candidates does not foreclose a finding of dilution also was endorsed in: *McIntosh County Branch of NAACP* v. *City of Darien*, 605 F.2d 753, 765 (5th Cir. 1979); *Cross* v. *Baxter*, 604 F.2d 875, 885 (5th Cir. 1979); *United States* v. *Board of Supervisors of Forrest County*, 571 F.2d 51, 956 (5th Cir. 1978); and *Yelverton* v. *Driggers*, 370 F. Supp. 612, 616 (S.D. Ala. 1974).

S. Rep. No. 97-417, 97th Cong., 2d Sess. 29 n. 115 (1982).

The black candidate's primary victory occurred after the trial of this case, and therefore the circumstances of his nomination are left undeveloped on this record. However, there are certain judicially noticeable salient facts which may explain this phenomenon. First, the same newspaper article upon which defendants rely (Motion, p. 6 n. 5) notes that "observers from throughout the court-drawn 2nd District reported a generally low voter turnout . . ." (Jackson) *Clarion-Ledger*, August 18, 1982, p. 1. Press reports attribute the low turnout to the lack of a strong white candidate, rain, confusion over election dates, the lack of an incumbent candidate, and court-ordered realignment of the district. *Id.*, pp. 1A, 2B. These reports tend to indicate that the off-normal-schedule August 17 primary was not a typical congressional primary election, and therefore not a real test of whether the district is discriminatory. Second, less than a week prior to the August 17 primaries, the District Court entered an order permitting Republican voters to participate in the Democratic congressional primary election. Order of Preliminary Injunction of August 13, 1982. This order enabled white Republicans to vote for Clark in the Democratic primary in order to give the white Republican nominee, Webb Franklin, a better chance of winning in the November general election.

In any event, Clark's primary victory does not dissolve the important legal question presented of whether the District Court erred in deferring to state racial redistricting policies found to violate Section 5.

II. DEFENDANTS' ARGUMENT THAT THE DISTRICT COURT WAS REQUIRED TO ADHERE TO THE STATE'S RACIAL REDISTRICTING POLICY BECAUSE THE ATTORNEY GENERAL'S SECTION 5 OBJECTION WAS "NONDISPOSITIVE" SHOULD BE REJECTED.

In defending the District Court's decision, the state official defendants make the bold argument that, contrary to *Upham*, the District Court was not obliged to remedy any constitutional or statutory defect in the state's plan because there was none. Defendants' argument turns upon the belief that coverage under Section 5 of the Voting Rights Act and the Attorney General's Section 5 objection have no legal consequences. "Thus no violation of the Voting Rights Act has ever been adjudicated and the statutory validity of S.B. 2001 remains undetermined." Motion, p. 9. The Attorney General's admittedly valid Section 5 objection, they state, is "nondispositive" and constitutes only "preliminary findings." *Id.*

Defendant's argument underlines the point made in our Jurisdictional Statement. The District Court's decision, and defendants' defense of that decision, constitute a direct challenge to the fundamental statutory framework of Section 5, which has withstood seventeen years of litigation and three congressional extensions.

The District Court's overriding of the Attorney General's Section 5 objection, and the defendants' arguments in support of that ruling, create an irreconcilable conflict with cases holding that the Attorney General's Section 5 objection is dispositive of a Section 5 violation, absent a Section 5 declaratory judgment from the District Court for the District of Columbia. See *Canady* v. *Lumberton City Board of Education*, 454 U.S. 957 (1981); *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 652 (1977). Nor does the mere filing of a Section 5 declaratory judgment action vitiate the Attorney General's objection. *Busbee* v. *Smith*, Civil No. 82-0665 (D.D.C. May 24, 1982) (three-judge court),

stays denied, No. A-1018 (May 25 and June 1, 1982) (Burger, C.J., and Rehnquist, J.).

The statutory framework of Section 5 clearly creates a presumption for covered states and jurisdictions that any new voting scheme is racially discriminatory and cannot be implemented unless the state sustains its burden of proving that the new plan is not racially discriminatory in purpose or effect. *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980). Once a Section 5 objection has been lodged, "the normal presumption of legitimacy afforded the balances reflected in legislative plans, see *Burns*, *supra*, at 84-85, could not be indulged." *Wise* v. *Lipscomb*, 437 U.S. 535, 549 (1978) (Powell, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ.). See also, *Perkins* v. *Matthews*, 400 U.S. 379, 406 (1971) (Black, J., dissenting); *City of Rome* v. *United States*, *supra*, 446 U.S. at 205 (Powell, J., dissenting) ("The preclearance requirement enforces a presumption against voting changes by certain state and local governments."); *Sims* v. *Amos*, 365 F. Supp. 215, 220 n.2 (M.D. Ala. 1973) (three-judge court). The legislative history of the Voting Rights Act makes clear that Congress has intended that "courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court." S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19 (1975), reprinted in [1975] U.S. Code Cong. & Admin. News 774, 784.[2]

---

[2] In arguing that the District Court was not limited by the need to cure any statutory defect in this case, defendants also make the irrelevant argument that the plaintiffs are precluded from litigating the constitutionality of the Mississippi Legislature's 1966 congressional redistricting plan because they are bound by the *Connor* v. *Johnson* decision by operation of res judicata or collateral estoppel. Motion, pp. 7-8. As a matter of fact, the plaintiffs in this case were not parties to the *Connor* v. *Johnson* litigation, and therefore are not in any way bound by the resolution of the constitutional issue in that case. See *Hathorn* v. *Lavorn*, —— U.S. ——, 72 L.Ed.2d 824, 836 n. 23 (1982).

III. PLAINTIFFS' PROPOSED COURT-ORDERED REDISTRICTING PLANS WERE JUSTIFIED BY THE FACTS OF THIS CASE.

In a stipulation which was admitted in evidence in this case (Ex. P-1), the State of Mississippi admitted:

> 16. Low black voter registration and voter turn-out combined with racial bloc voting make it necessary for an electoral district in Mississippi to contain a substantial majority of black eligible voters in order to provide black voters with an opportunity to elect a candidate of their choice. It has been generally conceded that, barring exceptional circumstances such as two candidates splitting the vote, a district should contain a black population of at least 65 percent or a black VAP of 60 percent to provide black voters with an opportunity to elect a candidate of their choice. In more recent elections black candidates have, on occasion, been elected to public office from districts with a population less than 65 percent black.

Also, the Attorney General in his Section 5 objection letter selected the pre-1966 Delta district, which was 65% black, as the benchmark for measuring whether the 1981 "least change" plan had a discriminatory effect prohibited by Section 5 (J.S., Appendix B, p. 26a). Given these facts, plaintiffs were fully justified in urging the District Court to adopt the Kirksey plans, which restored the 65% black Delta district, as a remedy for the unlawful dilution of black voting strength accomplished by the state's plan. *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977); *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 151 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977). Because plaintiffs advanced their proposed court-ordered plans as a remedy for the statutory violation found by the Attorney General, and not as a matter of right, defendants completely misconstrue our argument and engage in inflammatory and irrelevant demagoguery when they contend (Motion p. 10) that plaintiffs are arguing that

"black citizens of Mississippi have a constitutional right and statutory entitlement to a 65% black Congressional district." Because this remedy was fully justified by the facts of this case, the District Court's ruling that plaintiffs' plans "represent an obvious racial gerrymander" (541 F. Supp. at 144) should be repudiated by this Court.

CONCLUSION

For these reasons, the motion to dismiss or affirm should be denied, and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

WILLIAM L. ROBINSON
FRANK R. PARKER *
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway St.
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

ROBERT BRUCE MCDUFF
RATNER & SUGARMON
Suite 525
Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

Attorneys for Appellants

* Counsel of Record

Office-Supreme Court, U.S.
FILED
APR 7 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-233 and 82-413

In the Supreme Court of the United States

OCTOBER TERM, 1982

OWEN H. BROOKS, ET AL., APPELLANTS

v.

WILLIAM F. WINTER, GOVERNOR OF MISSISSIPPI, ET AL.

WILLIAM F. WINTER, GOVERNOR OF MISSISSIPPI ET AL., APPELLANTS

v.

OWEN H. BROOKS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General

CARTER G. PHILLIPS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the three-judge district court abused its discretion in declining to adopt as an interim congressional apportionment plan the State's newly-enacted plan, Senate Bill No. 2001, 1981 Miss. Laws (Extra. Session) ch. 8 ("S.B. 2001"), to which the Attorney General had objected pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether the district court properly exercised its discretion in choosing an apportionment plan that remedied the Attorney General's Section 5 objection to the state legislature's plan and best furthered the political policies embodied in the state legislature's redistricting plan.

3. Whether the judgment of the district court should be vacated and the case remanded so that the court can consider whether the interim plan is consistent with Section 2 of the Voting Rights Act of 1965 as amended on June 29, 1982.

Page

Constitution and statutes:

U.S. Const. Art. I, § 2 ..... 5, 11

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 *et seq.* 13

Section 3, 96 Stat. 134 13
Section 6, 96 Stat. 135 14

Voting Rights Act of 1965, 42 U.S.C. (& Supp. IV) 1973 *et seq.* :

Section 2, 42 U.S.C. 1973 ..... 13, 14, 18
Section 2(b), 42 U.S.C. 1973(b) 16
Section 5, 42 U.S.C. 1973c 3, 4, 5, 7, 8, 10, 14

House Bill No. 911, 1966 Gen. Laws 1251 2

Miscellaneous:

S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975) 14

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) 16

128 Cong. Rec. :

p. H3841 (daily ed. June 23, 1982) 14
p. S7095 (daily ed. June 18, 1982) 14

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-233

OWEN H. BROOKS, ET AL., APPELLANTS

v.

WILLIAM F. WINTER, GOVERNOR OF MISSISSIPPI, ET AL.

No. 82-413

WILLIAM F. WINTER, GOVERNOR OF MISSISSIPPI, ET AL., APPELLANTS

v.

OWEN H. BROOKS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the view of the United States.

STATEMENT

1. After the 1980 Decennial Census, the State of Mississippi learned that due to population movements within the State its preexisting congressional districting plan had become malapportioned (J.S. App. 3a).[1] Accordingly, the

[1] "J.S. App." refers to the appendix to the Jurisdictional Statement in No. 82-233.

State legislature set about the complex task of redistricting the five congressional districts. This, of course, was not the first time that the Decennial Census had forced Mississippi's legislature to reapportion the State's congressional districts, and, indeed, an explanation of prior redistricting plans—necessitated by the State's loss of a seat after the 1960 Census — is required to understand fully the controversy surrounding the 1981 plan.

Prior to the 1960 Census, Mississippi had six congressional districts. One of them, District 3, defined by a north-south boundary, encompassed an area almost coextensive with the eleven majority black counties of the so-called Delta area, and the black population in that district comprised about 65% of the total (J.S. App. 14a). In 1962, forced to redistrict because the 1960 Census reduced by one the number of congressional seats available to the State, the legislature combined what was then District 3 with then District 2 (82-233 J.S. 18). The resulting malapportioned district was 59% black and had a black voting-age population of about 52% (*id.* at 19).

In 1966, while litigation over the validity of the 1962 plan was pending,[2] the state legislature enacted House Bill No. 911, 1966 Gen. Laws 1251, which again attempted to reapportion the congressional districts. The plan radically altered the three northernmost congressional districts by drawing the district lines from east to west instead of from north to south. The heavily-black Delta counties were divided among four of the five districts, with the black

---

[2]On October 19, 1965, eight black voters filed suit on behalf of themselves and others similarly situated, in the United States District Court for the Southern District of Mississippi alleging that the new districts were unconstitutional, both because of population disparities and because of racial unfairness. See *Connor* v. *Johnson*, 279 F. Supp. 619, 621-622 (S.D. Miss. 1966), aff'd mem., 386 U.S. 483 (1967).

population constituting 43% in District 2 and 51% in District 1. The 1966 plan was not submitted for pre-clearance to either the Attorney General or the United States District Court for the District of Columbia as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.[3]

In 1972, the Mississippi legislature again enacted a new congressional districting plan to adjust for the 1970 Census. That plan made little change in the existing districts, and no district in the 1972 plan had a black population majority.[4]

---

[3]After the legislature redistricted the State, the *Connor* plaintiffs (see note 2, *supra*) amended their complaint to allege that the purpose and effect of the 1966 redistricting scheme were racially discriminatory. The three-judge district court held, however, that "one factor, and only one, may be taken into account in apportioning and establishing Congressional districts among the people of a state *and that factor is population.*" *Connor* v. *Johnson, supra,* 279 F. Supp. at 623 (emphasis in original; citations omitted). The district court also found that the plaintiffs, whose proof of racial animus had been based largely on newspaper accounts of the legislature's action, had "wholly failed their burden of proof" with respect to racial purpose because "solemn acts of Congress or of State legislatures may not be impeached or invalidated on nothing more than newspaper reports" (*id.* at 623-624). This Court summarily affirmed. 386 U.S. 483 (1967).

[4]The 1972 plan was submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. No objection under Section 5 was interposed and the then Assistant Attorney General for the Civil Rights Division explained (Ex. P-1, Attachment P, Letter from Assistant Attorney General Norman to Mississippi Attorney General Summer (May 30, 1972)):

> The Attorney General will not object to House Bill 448. The basis of this decision is our reading of *Connor* v. *Johnson,* 279 F. Supp. 620 (S.D. Miss. 1966), aff'd, 386 U.S. 483 (1967), in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state. Because we feel bound by the decisions of the courts in that case, we do not interpose an objection.

It was against this background that the State legislature in August 1981, again adjusted the boundaries of Mississippi's congressional districts to deal with population changes reflected in the 1980 Census. After a thorough review of a number of alternative proposals (J.S. App. 8a), the legislature enacted Senate Bill 2001, 1981 Gen. Laws (Extra. Session ch. 8). As in 1972, the plan that the legislature chose was one that kept the basic scheme of east-west lines dividing the predominantly black Delta and creating no district with a black population majority.[5]

2. On November 10, 1981, the State submitted S.B. 2001 to the Attorney General for preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (J.S. App. 25a). The submission was completed on January 29, 1982, and on March 30, 1982, the Assistant Attorney General for the Civil Rights Division interposed an objection to the legislature's plan. The objection letter (J.S. App. 25a-29a) noted that the black population of the State, which is approximately 35% of the total population, "in large part is still concentrated in the Delta region" (*id.* at 27a). That region is divided by horizontally-drawn district lines "in such manner as to dismember the black population concentration and effectively dilute its voting strength" (*ibid.*). The letter further pointed out that alternative proposals, which would have avoided this fragmentation of black voting strength, had been presented to the reapportionment committee that had recommended a final plan to the legislature and the legislature's rejection of those proposals had not been adequately explained (*id.* at 28a). The letter also stated that the government had received complaints that a racially

---

[5]District 2 of S.B. 2001 has a black population percentage of 47.95% as compared to 45.93% in the 1972 plan (82-233 J.S. 19).

discriminatory purpose accounted for adoption of the more dilutive scheme. Finally, the letter concluded (*ibid.*):

> The adoption of the east-west configuration of the proposed plan, instead of a configuration which recognizes the Delta as a community of interest, suggests to us an unnecessary retrogression in the position of black voters in Mississippi.

The Mississippi legislature adjourned several days after the objection was interposed without enacting a new plan (J.S. App. 2a-3a).[6]

3. On April 5, 1982, appellants, representing a class of all black and white voters in the State of Mississippi, filed this redistricting suit in the United States District Court for the Northern District of Mississippi (J.S. App. 3a). Appellants claimed that no lawful districting plan was then in effect in Mississippi for purposes of the upcoming 1982 congressional elections. Because of statewide population changes, the preexisting plan, adopted in 1972, had become grossly malapportioned in violation of the "one person, one vote" requirement of Article I, Section 2 of the Constitution. In addition, S.B. 2001 had been objected to by the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and thus could not be implemented. Appellants requested an injunction against both plans for the 1982 elections, and asked the court to adopt an interim plan.[7]

---

[6]On April 7, 1982, the State filed suit under Section 5 of the Voting Rights Act in the United States District Court for the District of Columbia, seeking to preclear S.B. 2001 as having neither a discriminatory purpose nor effect. See note 10, *infra*.

[7]Appellants also asked the court to postpone certain election dates, viz., party primaries scheduled for June 1, 1982 (J.S. App. 3a).

In undertaking the " 'unwelcome obligation' " of prescribing a redistricting plan for Mississippi for the impending congressional elections (J.S. App. 9a), the district court first rejected the State's suggested use of S.B. 2001 as both "inappropriate and unseemly" since the plan's validity under Section 5 was open to question in light of both the Attorney General's objection (J.S. App. 10a) and the pending preclearance action in the United States District Court for the District of Columbia (see note 6, *supra*). Moreover, the court found that reliance on S.B. 2001 was unnecessary, since the court had available to it alternative proposals that properly reconciled the State's apportionment policies with federal statutory and constitutional requirements (J.S. App. 10a).

Second, the district court rejected the State's alternative suggestion that the court adopt the existing 1972 redistricting plan (J.S. App. 10a). The court found this plan with its 17.6% population variance to be "grossly malapportioned" under this Court's decisions in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wells* v. *Rockefeller*, 394 U.S. 542 (1969). In addition, the court found that it had alternative, properly apportioned plans available, and thus held that it would be constitutionally impermissible to adopt the 1972 plan, even on an interim basis (J.S. App. 11a).

The district court then focused on the three remaining plans that had been proposed to and rejected by the Mississippi legislature. They were the "primary Kirksey plan"—originally drafted by a black state senator—that redrew the Delta district along north-south boundaries to create a 64.37% black majority; the "fall-back" Kirksey plan, which provided a 65.81% black majority in a north-south Delta district; and the "Simpson plan," which also was drawn along a north-south boundary and produced a 53.77% black majority district. It also provided for a second district with a 45.25% black minority. The Kirksey plans were

urged on the court by appellants and the Simpson plan was presented by the AFL-CIO, acting as amicus curiae (J.S. App. 8a).

In choosing among these plans, the district court attempted to respect the State's political policies underlying the districting plan the legislature had adopted, so long as they were consistent with statutory and constitutional restrictions. See *Upham* v. *Seamon*, 456 U.S. 37 (1982). The court found that S.B. 2001 was the product of the following state policies: minimal change in the existing districts, de minimis population variations, protection of incumbents' constituencies and establishment of two districts with 40% or greater black population (J.S. App. 12a). The court found that neither Kirksey plan satisfied the policy of having two "high impact" districts,[8] which policy the court held was valid because two high impact districts can protect minority voting strength as well as one district with a black majority and other districts with a minority vote that is too insignificant to allow blacks in those districts to exercise any real political influence (J.S. App. 13a-14a).

In addition, the district court found that the Simpson plan, which did provide for a majority black district and a substantial minority black district, had "significant," affirmative advantages over the two Kirksey plans; it better preserved precinct lines and it preserved a community of interest in District 2 by restricting the district to rural, predominantly agricultural areas[9] (J.S. App. 15a).

Finally, the court rejected plaintiffs' contention that Section 5 required creation of a 65% black district in order to protect against retrogression of black voting strength.

---

[8]Both Kirksey plans had second districts with a black minority population of about 33% (J.S. App. 8a).

[9]The Kirksey plans extended District 2 "into metropolitan Hinds County and the City of Jackson" (J.S. App. 14a).

Plaintiffs argued that the correct benchmark for measuring retrogression was former District 3, which had a 65.51% black majority according to 1960 census figures. Noting that retrogression must be tested against the districting plan in effect on November 1, 1964—the effective date of Section 5 coverage—the court determined that the appropriate retrogression benchmark was old District 2, measured against current population figures. The court reasoned (J.S. App. 15a):

> Of course, if the district lines in effect on November 1, 1964, had never been changed, § 5 retrogression could not be implicated, even if there was a reduction in the percentage of blacks residing in former District 2. Computations show that, under 1980 census figures, the formerly 59.29% black majority district is now comprised of only 48.09% black population. Thus, the Simpson amendment with a 53.77% majority district represents an augmentation, rather than diminution, of black voting strength.

Accordingly, the district court ordered the State to implement the Simpson plan for the 1982 congressional elections "and thereafter until a redistricting plan * * * is precleared in accordance with § 5 of the Voting Rights Act of 1965 * * *" (J.S. App. 20a).[10]

---

[10]After the district court in this case adopted its interim plan, the State in its preclearance action filed a motion for partial summary judgment, asking the District of Columbia court to hold that the preexisting 1972 plan is the appropriate benchmark against which to measure S.B. 2001 for retrogression under *Beer* v. *United States*, 425 U.S. 130 (1976). The district court denied the motion and decided, instead, that S.B. 2001 should be measured against the court-ordered interim plan *i.e.*, the Simpson Plan (J.S. App. 38a). Mississippi has appealed the district court's denial of its motion for partial summary judgment, *State of Mississippi* v. *Smith*, No. 82-540 (Juris. Statement filed July 28, 1982). The government has moved to dismiss the appeal for want of jurisdiction on the ground that the order is not appealable under 42 U.S.C. 1973c.

DISCUSSION

1. The State argues on cross-appeal (82-413 J.S. 7-14) that the district court erred in declining to adopt S.B. 2001 as a court-ordered interim plan. The State supports this assertion with two arguments — (1) the Attorney General's Section 5 objection did not finally resolve the validity of S.B. 2001 under the Voting Rights Act and thus the State should have been allowed to implement its plan until the preclearance action was finally decided, and (2) the Mississippi district court's adoption of an interim plan, coupled with the District of Columbia court's use of that plan as the benchmark for measuring whether S.B. 2001 is retrogressive (*Mississippi* v. *Smith*, 541 F. Supp. 1329, 1333 (D. D.C. 1982)) has effectively foreclosed Mississippi from exercising its statutory right to seek preclearance of S.B. 2001 in a declaratory judgment action in the District of Columbia District Court (82-413 J.S. 7-12).[11] The State's first contention is legally incorrect and its second, although it may be correct, is legally irrelevant to the validity of the Mississippi district court's redistricting decision. Accordingly, the district court's order rejecting S.B. 2001 as the interim plan should be affirmed.

Contrary to the State's assertion, the pendency of the State's preclearance suit in no way restricts the redistricting court's discretion in deciding whether to adopt the State's unprecleared plan. It is settled that a three-judge redistricting court has discretion to *enjoin* implementation of a change affecting voting that is subject to preclearance, but which has not been precleared. *Canaday* v. *Lumbarton City Board of Education*, 454 U.S. 957 (1981); *United*

---

[11]The practical effect the State contends (82-413 J.S. 8-9) is that: "the State of Mississippi is now in the untenable and wholly illogical position of proving to the Section 5 Court, lack of retrogression [of S.B. 2001] from a standard created after the enactment of S.B. 2001."

States v. *Board of Supervisors*, 429 U.S. 642, 644-645 (1977); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 554-555 (1969); cf. *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982). Where alternatives are available that indisputably comply with federal statutory and constitutional requirements, it cannot be an abuse of discretion for the district court to reject, as an "interim plan," a State's districting scheme that has been expressly objected to under Section 5 by the Attorney General. The entire scheme of the Voting Rights Act, as explained in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966), was designed to "shift the advantage of time and inertia" *away* from the jurisdiction that had enacted a voting change subject to preclearance. Accordingly, the pendency of the preclearance suit is no basis for challenging the district court's refusal to adopt S.B. 2001.

The State's alternative argument that the interim plan should be overturned because the preclearance court has adopted it as the "benchmark" for evaluating whether S.B. 2001 has a retrogressive effect is also no basis for challenging the decision of the Mississippi court. This argument is no more than an attempt to litigate an issue that is clearly not relevant to this appeal and is in any event not ripe for review by this Court.[12] For reasons stated in our Motion to

---

[12]The State argues (82-413 J.S. 10) that "it is devoid of all reason to charge the legislature with the responsibility of insuring that their redistricting plan will not represent a retrogression from any potential, but as yet non-existent, interim plan." The basis for that assertion does not rest, however, on the action taken by the court below, but rather on the District of Columbia district court's decision in *Mississippi* v. *Smith*, *supra*, 541 F. Supp. at 1329, to select the subsequently adopted interim plan as the retrogression benchmark for Section 5 review of S.B. 2001. While we have serious misgivings about the correctness of that separate district court determination, the proper place to address that issue is in the *Mississippi* case, either during the trial proceedings in the district court for the District of Columbia or, when properly presented on appeal, in this Court (see United States' Motion to Dismiss, No. 82-540). There is no occasion for the matter to be considered here.

Dismiss (at 3-6), in *State of Mississippi* v. *Smith*, No. 82-540, the State has filed a premature appeal from the preclearance district court's interlocutory order, declaring the interim court-ordered plan to be the benchmark in the Section 5 proceeding on whether S.B. 2001 has a discriminatory effect. We did not address the merits of the State's arguments regarding the appropriate "benchmark" in our Motion to Dismiss, but we did offer to address them at the Court's request. In any event, the District of Columbia court's decision is simply not final; the State is free to seek reconsideration of the benchmark at the Section 5 trial and if it loses, to appeal the issue to this Court after a final judgment is entered. The use or misuse of the interim plan by another court casts no doubt on the validity of the Mississippi district court's decision to substitute a clearly valid plan in place of one that has been objected to by the Attorney General.[13]

2. Appellants argue (82-233 J.S. 8-30) that the district court erred in deferring to the State's policy of preferring to retain two districts with substantial black populations and thereby rejecting their proposed plan, which would have provided blacks with at least one black district with a substantial majority. We do not agree with appellants that the district court erred in adopting the Simpson plan.

This Court last Term in *Upham* v. *Seamon*, 456 U.S. 37 (1982), set out general principles for a district court to apply

---

[13]Although not directly challenged by the State, the district court's refusal to allow elections to be conducted under the 1972 congressional districting plan was also plainly correct. Article I, Section 2 of the Constitution mandates redistricting in line with the Decennial Census, and requires that "as nearly as practicable one man's vote * * * is to be worth as much as another's." *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964), quoted in *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 527-528 (1969). The 1972 plan contains a total population variance of 17% and thus, absent compelling exigent circumstances, such a plan could not be adopted, even on an interim basis.

when, in the face of a Section 5 objection to a legislative redistricting plan, the court itself must adopt an interim plan. First, this Court in *Upham* held that an interim plan should meet the express objection interposed by the Attorney General. 456 U.S. at 41. In our view the district court correctly applied this principle by adopting a plan which does not fragment the Delta.

Appellants argue (82-233 J.S. 8, 9, 12-14) that one of the Kirksey plans should be adopted because the Attorney General, when interposing his objection to S.B. 2001, implicitly objected to any plan that does not create one district with a black majority of 65%. This is simply not an accurate reading of the Attorney General's objection. In terms, the objection letter—while alluding to a time in the past when there was a 65% district—objects only to the fragmentation of the Delta by use of horizontally drawn district lines. See J.S. App. 27a-28a. The letter did not state, nor does the Attorney General maintain, that a 65% black district is required for purposes of Section 5 preclearance. The State has chosen to seek preclearance of S.B. 2001 in the District Court for the District of Columbia, and appellants, as intervenors in the preclearance suit (J.S. App. 31a), are free to make any argument they believe appropriate as to whether S.B. 2001 complies with Section 5. The Simpson Plan reunites the Delta. No more was required by the Attorney General's objection to S.B. 2001.

Second, this Court held in *Upham* that the redistricting court should respect the political policies of the State as reflected in the districting scheme adopted by the state legislature. The district court conscientiously applied this standard and found that the Simpson plan properly satisfied three State policies as well as or better than the Kirksey plans, viz., preserving incumbents' constituencies, maintaining a de minimis population deviation, and creating two black districts with at least 40% black populations (J.S.

App. 14a).[14] In addition, the court found that the Simpson plan preserves a community of interest in all the districts. We submit that the district court's approach in attempting to choose the interim plan that the State legislature most likely would have adopted was fully consistent with the teaching of this Court in *Upham*.

3. This case was decided by the district court on June 8, 1982. On June 29, 1982, the President signed into law the Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131 *et seq.* Section 3 of that Act amends Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, so that it now provides (96 Stat. 134; emphasis added):

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color * * *.

Congress explained in Section 3 what it meant by a voting procedure "resulting" in a denial or abridgement of the right to vote on account of race or color:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens

---

[14]The district court made no specific findings regarding the actual existence of a swing-vote influence of blacks in Mississippi and there is no basis to presume that the State's policy is an impermissible one. Obviously, if the State's policy were shown to be the product of an intent to discriminate, it would be an abuse of the court's equitable discretion to adopt a plan to further that policy. See *Connor* v. *Finch, supra*, 431 U.S. at 421; *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 639 (1976); *Chapman* v. *Meier*, 420 U.S. 1, 17-19 (1975). Cf. *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975).

protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

In light of Congress' action, we think that the district court should reconsider the Simpson plan, and the other plans presented to it, under the new standards in amended Section 2. Congress intended the Act to take effect immediately (Section 6, 96 Stat. 135) and that it be applied in pending cases. See 128 Cong. Rec. S 7095 (daily ed. June 18, 1982) (remarks of Sen. Kennedy); 128 Cong. Rec. H 3841 (daily ed. June 23, 1982) (remarks of Reps. Sensenbrenner and Edwards). See also *Bradley* v. *Richmond School Board,* 416 U.S. 696, 711 (1974). Under the pressure of an impending election, and given only a few plans from which to choose, courts must have considerable discretion in adopting an "interim" plan. Nonetheless, this Court has pointed out that a reapportionment "court should follow the appropriate Section 5 [of the Voting Rights Act of 1965] standards," *McDaniel* v. *Sanchez,* 452 U.S. 130, 149 (1981), quoting S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19 (1975), in devising an interim plan. It is unreasonable to assume that Congress intended for the reapportionment court to follow Section 5, but ignore Section 2 of the Voting Rights Act. Accordingly, a remand in order to evaluate the validity of the Simpson plan under Section 2 is consistent with Congress' intent.

On remand, the district court should examine the existing record along with any appropriate supplemental evidence,

pursuant to amended Section 2 standards. Under those standards, the district court should consider the following two points: (1) whether, as a factual matter, the record establishes that blacks are afforded equal access to the political process in districts in which they constitute a substantial minority of at least 40% of the population, and (2) whether the state policy found by the court, favoring creation of two "high impact" districts, is in fact not "tenuous," *i.e.*, is divorced from maintenance of racial discrimination.

One of the state policies which the district court found and to which it accorded deference was an apparent policy to distribute the black vote so that it would constitute 40% or more of at least two districts, rather than concentrating the black population in one district to create a black voting age population majority. The district court correctly reasoned that neither the Constitution nor the Voting Rights Act requires either proportional representation or a "safe" minority seat (J.S. App. 13a). The "adequacy of representation is not measured solely by the black community's ability to elect its first-choice candidate." *City of Rome* v. *United States*, 472 F. Supp. 221, 248 (D. D.C. 1979), aff'd, 446 U.S. 156 (1980). In addition, the district court pointed out that having the ability to exert a swing-vote influence in two districts could well be more advantageous to minority interests than having a reasonable ability to choose a single candidate, if that means being excluded from having any real influence in all other districts. See *Wyche* v. *Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981); *United States* v. *Board of Supervisors*, 571 F.2d 951, 956 (5th Cir. 1978). The district court did not, however, make a factual finding that blacks have such a "swing-vote" potential in Mississippi.

Such a finding is required by the standards Congress subsequently prescribed in amending Section 2. In determining whether members of a racial group have "less

opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (Section 2(b), as amended by Pub. L. No. 97-205, 96 Stat. 134), courts must now make factual findings with respect to several, objectively measurable factors. Among these factors are the extent to which voting in the state or subdivision is racially polarized and the extent of any past discrimination that has "touched the right of the members of the minority groups to register to vote or otherwise participate in the democratic process."[15] Congress was well aware, however, that racially polarized bloc voting — or any of the other objective factors necessary to prove discriminatory "result" — could not be presumed to exist. S. Rep. No. 97-417, 97th Cong., 2d Sess. 33-34 (1982).[16]

In addition, the Senate Report accompanying the amended Voting Rights Act instructs that under Section 2, courts should consider "whether the policy underlying the state['s]* * * use of [a particular apportionment scheme] is tenuous" (S. Rep. No. 97-417, *supra*, at 29). This phraseology is taken directly from *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds, 424 U.S. 636 (1976). In that case, the court described a "non-

---

[15]S. Rep. No. 97-417, *supra*, at 28-29. There is some relevant evidence in the present record. The parties have stipulated, for example, to an extensive history of discrimination (Ex. P-1, Stipulation Nos. 1 to 8), a present inhibitory effect on black voting of that past discrimination (*id.*, Stipulation No. 9), and to a prevalence of racial bloc voting such that absent a black voting age population majority of 60%, blacks generally have no opportunity to elect representatives of their choice (*id.*, Stipulation Nos. 10 and 16). The district court may well take additional evidence, including evidence concerning the results of the 1982 congressional party primaries and elections.

[16]Congress also made absolutely clear that the failure of black candidates to win elections could not in itself constitute a prima facie case of discriminatory "result." See Section 2(b) and S. Rep. No. 97-417, *supra*, at 31-33.

tenuous" state policy as one which is "strong" and "divorced from the maintenance of racial discrimination [citation omitted]" (485 F.2d at 1305).

No one contends that state Representative Simpson, the author of the plan adopted by the district court, devised his plan with any intent to dilute the black vote. It is undisputed that the State has, since 1966, in fact maintained 40%-plus, but not majority, black districts, and that Thomas D. Campbell, Chairman of the Joint Apportionment Committee, had been an advocate of that approach. Certainly it lies within the prerogatives of the State of Mississippi to determine which of several non-discriminatory alternatives best achieves the State's policy objectives. A three-judge district court sitting in that State has concluded that two 40%-plus districts achieve the State's legitimate objectives better than a single majority district. The court, however, made no determination, necessary to a Section 2 analysis, as to whether the record supports the conclusion that the apparent State policy, embodied in the Simpson plan, is "non-tenuous."[17]

---

[17]The district court's determination that an effort to design a majority black district constituted a racial gerrymander (J.S. App. 13a-14a) is no substitute for the essential Section 2 inquiry. Indeed, in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), this Court recognized that race consciousness is often legitimately a part of reapportionment. Legislatures and courts may deliberately create majority black districts when necessary to comply with the requirements of the Voting Rights Act. See *ibid.*; *Mississippi* v. *United States*, 490 F. Supp. 569 (D. D.C. 1979) (three-judge court), aff'd, 444 U.S. 1050 (1980).

CONCLUSION

The order of the district court rejecting S.B. 2001 as an interim redistricting plan should be affirmed. The order of the district court adopting the "Simpson proposal" as an interim plan until the State preclears a new plan should be vacated and the case remanded for further findings in light of the intervening amendment of Section 2 of the Voting Rights Act of 1965.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General

CARTER G. PHILLIPS
Assistant to the Solicitor General

APRIL 1983

DOJ-1983-04

Office-Supreme Court, U.S.
FILED
APR 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

---

REPLY OF OWEN H. BROOKS, ET AL., APPELLANTS, TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WILLIAM L. ROBINSON
*FRANK R. PARKER
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

Attorneys for Appellants

*Counsel of Record

April, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE SOLICITOR GENERAL'S ARGUMENT THAT THE COURT-ORDERED PLAN SATISFIES THE SECTION 5 OBJECTION TO S.B. 2001 (THE LEAST CHANGE PLAN) AND MEETS SECTION 5 STANDARDS IS ERRONEOUS AND SHOULD BE REJECTED	2
II. SWORN TESTIMONY, TAKEN AFTER THE TRIAL IN THIS CASE, SHOWS THAT THE DISTRICT COURT ERRED WHEN IT RULED THAT THE CREATION OF 40 PERCENT BLACK OR BETTER "HIGH IMPACT" DISTRICTS WAS A STATE POLICY FOLLOWED IN MISSISSIPPI CONGRESSIONAL REDISTRICTING	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Busbee v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 51 U.S.L.W. 3552 (U.S. Jan. 24, 1982)	7
City of Rome v. *United States*, 446 U.S. 156 (1980)	8
Connor v. *Finch*, 431 U.S. 407 (1977)	6, 7, 8
Donnell v. *United States*, Civil No. 78-0392 (D.D.C. July 31, 1979), *aff'd mem.*, 444 U.S. 1059 (1980)	7
Kirksey v. *Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977)	7, 8
Mississippi v. *United States*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980)	2
Sims v. *Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965)	5, 6
United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977)	4
Upham v. *Seamon*, 456 U.S. 37 (1982)	5, 9

Other Authorities	
Loewen, J. & C. Sallis, MISSISSIPPI: CONFLICT AND CHANGE (rev. ed. 1980)	4
Key, V. O., Jr., SOUTHERN POLITICS IN STATE AND NATION (1949)	4
Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 Miss. L.J. 391 (1973)	3, 6
Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-233

OWEN H. BROOKS, *et al.*,
Appellants,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

---

REPLY OF OWEN H. BROOKS, ET AL., APPELLANTS, TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed to reply to the Brief for the United States as Amicus Curiae which was filed this month [1] and as a supplemental brief pursuant to Sup. Ct. Rule 16.6 to call the Court's attention to intervening facts not available at the time of the filing of our last brief some four months ago.

Appellants also give notice to the Court that *Mississippi* v. *Smith*, No. 82-540, the case in the District Court for the District of Columbia in which Mississippi is seeking Section 5 preclearance of S.B. 2001, the "least change" plan, has been dismissed by the District Court on the motion of the state. Order of April 11, 1983. Mississippi's appeal in No. 82-540 therefore should be dismissed as moot, and the dismissal of that action also should have

---

[1] This Court invited the Solicitor General to file a brief expressing the views of the United States on November 1, 1982. 51 U.S.L.W. 3339.

a direct bearing on the appeal in No. 82-413, *Winter* v. *Brooks*, in which the state contends that the Mississippi District Court in this case erred in not ordering into effect the unprecleared "least change" plan for the 1982 Mississippi congressional elections.

I. THE SOLICITOR GENERAL'S ARGUMENT THAT THE COURT-ORDERED PLAN SATISFIES THE SECTION 5 OBJECTION TO S.B. 2001 (THE LEAST CHANGE PLAN) AND MEETS SECTION 5 STANDARDS IS ERRONEOUS AND SHOULD BE REJECTED.

The Solicitor General contends in his brief that the Section 5 objection to S.B. 2001, the "least change" plan, "objects only to the fragmentation of the Delta by use of horizontally drawn district lines" (Brief, p. 12), and that the court-ordered plan, the "Simpson plan," by reuniting the Delta, meets this objection: "The Simpson Plan reunites the Delta. No more was required by the Attorney General's objection to S.B. 2001" (*id.*). With deference, this contention is erroneous and should be rejected.

A. The text of the Section 5 objection letter itself shows that while the Attorney General objected to the dismemberment of the Delta area, this was not the "only" or exclusive basis for the objection. The Section 5 objection letter also states that the Attorney General has an obligation to assure himself that "the instant plan 'fairly reflects the strength of black voting power as it exists'" (quoting *Mississippi* v. *United States*, 490 F. Supp. 569, 581 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980)), and the letter objects to lines which "dismember the black population concentration *and effectively dilute its voting strength*" (J.S., App. B, p. 27a) (emphasis added). The letter of objection notes that prior to the adoption of the Voting Rights Act, the preexisting Delta district "included a sixty five percent black population majority" (*id.*, p. 26a), and that the lines of S.B. 2001

suggested "an unnecessary retrogression in the position of black voters in Mississippi" (*id.*, p. 28a).[2]

B. Simply putting the Delta counties back together again in a single district cannot, by itself, remedy this Section 5 objection because fragmentation or dismemberment of a black population concentration is not the only method by which a redistricting plan can fail to "fairly reflect[] the strength of black voting power as it exists," "effectively dilute its voting strength," or effectuate "an unnecessary retrogression in the position of black voters in Mississippi." Racial gerrymandering of district lines can be accomplished by "cracking," "stacking," and "packing."[3] "Cracking" is the fragmentation and dispersal of a black population concentration; "stacking" occurs when a black population concentration is unnecessarily combined with a white population concentration and black voting strength is diluted; and "packing" is the overconcentration of minority populations in a single district greatly in excess of the percentage needed for minority voters to elect candidates of their choice.[4] The Simpson plan dilutes black voting strength in the Delta area by "stacking."

The facts of this case strongly point to a conclusion that the Simpson plan has the purpose and effect of diluting black voting strength in the Delta area. Historically, the majority black counties of the Delta area together formed a separate congressional district.[5] Suddenly, after

---

[2] Also implicit in the objection letter is the fact that the Mississippi Legislature, by dividing the Delta, created two districts which were only 47.95 percent black and 45.32 percent black. J.S., pp. 3, 12-14. Acknowledgement of these statistics was necessary to findings that the "least change" plan "effectively dilut[ed] [black] voting strength" and represents "an unnecessary retrogression in the position of black voters in Mississippi."

[3] See Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 Miss. L.J. 391, 402-03 (1973).

[4] *Id.*

[5] Mississippi had a majority black Delta congressional district from 1882 to 1966. J.S., p. 16.

the latest plan which fragmented the Delta area has been invalidated, the thirteen majority black counties in the Mississippi Delta are unnecessarily combined in an irregularly-shaped district with six predominantly white Hill counties in the east-central portion of the state, counties which historically have not been included in the Delta congressional district.[6] J.S., pp. 18, 25-26. In spite of Mississippi's stipulation that election districts in Mississippi must be at least 65 percent black in population or 60 percent black in voting age population to give black voters an opportunity to elect candidates of their choice (Ex. P-1, p. 5 ¶ 16), a primary reason given for this unprecedented aggregation of majority black counties with majority white counties is to minimize black voting strength at the 40 percent or better level (J.S., App. A, p. 14a). Alternatives were presented to the District Court which would have restored the Delta district in districts which are more compact and contiguous without including these six predominantly white Hill counties. J.S., pp. 26-27.[7] The aggregation of the Simpson plan thus reduces what previously was and still could be a 65 percent black Delta district to a district in which black voters constitute only 53.77 percent of the total population and only 48.76 percent of the voting age population,[8]

---

[6] Apart from race, "[t]he deepest split in Mississippi politics is between the Delta and 'the hills'; this split has affected history in the state since before the Civil War." J. Loewen & C. Sallis, MISSISSIPPI: CONFLICT AND CHANGE 17 (rev. ed. 1980); also, V. O. Key, Jr., SOUTHERN POLITICS IN STATE AND NATION, ch. 11, "Mississippi: The Delta and the Hills" (1949).

[7] The Solicitor General in his brief concedes that the primary reason given by the District Court for rejecting both of the Kirksey plans, that creating a majority black district constituted racial gerrymandering (J.S., App. A, pp. 13a-14a), is erroneous as a matter of law under this Court's decision in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977). Brief, p. 17 n. 17. This, in itself, is sufficient to require reversal of the District Court's decision.

[8] Exhibit P-17, Revised Exhibit, containing statistics stipulated by defendants as correct, reflects that District 2 in the Simpson

"turning Negro majorities into minorities." *Sims* v. *Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965) (three-judge court). The conclusion is inescapable that these six heavily white Hill counties were linked needlessly with the Delta counties for the purpose of preventing the election of a black member of Congress, and it definitely has had that effect.[9]

C. *Upham* v. *Seamon*, 456 U.S. 37 (1982), requires that before a state's legislative policies may be considered, a remedial plan proposed to remedy a Section 5 objection must first meet "the substantive constitutional and statutory standards to which such state plans are subject" (*id.* at 42). Prior Section 5 cases demonstrate that "stacking" is just as offensive to Section 5 standards as other forms of gerrymandering. The Justice Department's position in this case contradicts the position it has taken in these prior cases and Section 5 administrative proceedings. In the Mississippi legislative reapportionment case the Attorney General objected under Section 5 to multi-member legislative districts in which black majority counties were unnecessarily combined with white majority counties wherever possible to form districts with white voting age population majorities. Memorandum for the

---

plan is only 48.76 percent black in voting age population. Our Jurisdictional Statement (p. 6, footnote 4) should thus be corrected to reflect this figure. Ex. P-17, as revised, states the following black voting age population percentages for the five districts in the Simpson plan:

District	Black VAP Percent
1	21.91%
2	48.76%
3	29.53%
4	38.48%
5	17.35%

[9] State Rep. Robert Clark, a black state legislator who had the support of the black voters and the white Democratic leadership of the state, was defeated in the November, 1982 general election in this district by a white Republican who ran a racially-charged campaign. See our Supplemental Brief for Appellants, filed in December.

United States as *Amicus Curiae*, pp. 16-17, App. B, p. B-6, *Connor* v. *Waller*, 421 U.S. 656 (1975). In 1981 in the Virginia legislative reapportionment case the Attorney General objected to House districts in which each of "five majority black counties is combined with one or more predominantly white counties in such a way that there is a black minority in each of the resulting districts," and also objected to a House district in which the City of Petersburg, which is 61 percent black, was unnecessarily combined with an adjacent predominantly white city to convert a black majority district into a black minority district.[10] The Attorney General also has objected to Mississippi county redistricting plans for "stacking."[11]

"Stacking" has been condemned as violative of constitutional voting rights guarantees as well. Applying constitutional principles against inpermissible racial dilution, this Court in *Connor* v. *Finch*, 431 U.S. 407 (1977), disapproved a court-ordered legislative reapportionment plan which unnecessarily combined majority black counties with adjacent majority white counties and beats to create districts with white voting majorities (431 U.S. at 424-25). Similarly, in *Sims* v. *Baggett*, *supra*, a three-judge District Court struck down as unconstitutional for racial gerrymandering a legislative reapportionment plan in which majority black counties were unnecessarily aggregated with majority white counties to dilute black voting strength (247 F. Supp. at 109).

D. Thus, contrary to the Solicitor General's argument, the Simpson plan cannot pass Section 5 muster simply because it restores the Delta counties in a single district and creates a 53.77 percent black district. Restoring the

---

[10] Section 5 objection letter to Va. Acts, 1981, ch. 5, letter from William Bradford Reynolds, Assistant Attorney General, to Perkins Wilson, July 31, 1981, reprinted in *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 466-67 (1982).

[11] See Parker, *County Redistricting in Mississippi*, *supra*, 44 Miss. L.J. at 405-08.

Delta, in and of itself, does not necessarily ameliorate dilution of black voting strength. If, in the Second District of the Simpson plan, the Delta counties were linked with a number of predominantly white counties to create a district which was 47.95 percent black—the identical racial percentage of the Second District in the objected-to "least change" plan (J.S., p. 3), putting the Delta counties in one district—in and of itself—clearly would not satisfy the Section 5 objection. Section 5 case law is clear that the nonretrogression and anti-dilution standards of Section 5 are not satisfied merely because a district with a slight black population majority is created. In *Donnell* v. *United States*, Civil No. 78-0392 (D.D.C. July 31, 1979), *aff'd mem.*, 444 U.S. 1059 (1980), a Mississippi Section 5 preclearance case, the District Court disapproved a plan which created two districts which were 61.0 percent and 60.6 percent black, respectively, because they were retrogressive of preexisting levels of black voting strength and because they failed to accord black voters the opportunity to elect candidates of their choice. More recently, in *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 51 U.S.L.W. 3552 (U.S. Jan. 24, 1983), the District Court disapproved under Section 5 as racially motivated a Georgia congressional redistricting which split up the black population concentration in southern Fulton and DeKalb counties, but which contained a congressional district which was 57.28 percent black (549 F. Supp. at 498).[12]

[12] Districts with razor-thin black population majorities which dilute black voting strength have been struck down in constitutional litigation as well. In *Connor* v. *Finch*, *supra*, this Court disapproved five senatorial districts in Hinds County for dilution of black voting strength (431 U.S. at 423). Two of those districts were 54.0 and 53.4 percent black, respectively, but only 48.6 and 48.0 percent black in voting age population. Brief for the United States, App. C, p. 49a, *Connor* v. *Finch*, 431 U.S. 407 (1977). The senatorial district which included Jefferson County and parts of Adams County, also disapproved by this Court (431 U.S. at 424-25), was 56.6 percent black in population and 52.1 percent black in voting age population. Brief for the United States, App. C, p. 71a. The Fifth Circuit sitting *en banc* in *Kirksey* v. *Board of Super-*

E. The Solicitor General's argument overlooks these important legal principles established in both Section 5 and constitutional litigation, and also neglects to consider the trial record and the facts of this case. His suggestion that the District Court's approach was correct in choosing a plan "that the State legislature most likely would have adopted" is blind to the documented historical record of purposeful racial gerrymandering by the Mississippi Legislature in congressional redistricting since 1966 (J.S., pp. 16-23). The Solicitor General's argument also ignores the stipulated fact that the Second District in the Simpson plan is majority white in voting age population and only 48.76 percent black in voting age population,[13] Mississippi's stipulation that a district must be at least 60 percent black in voting age population to give black voters an opportunity to elect candidates of their choice, and the defeat under the Simpson plan of a heavily-favored and widely-supported black candidate in the November general election.

II. SWORN TESTIMONY, TAKEN AFTER THE TRIAL IN THIS CASE, SHOWS THAT THE DISTRICT COURT ERRED WHEN IT RULED THAT THE CREATION OF 40 PERCENT BLACK OR BETTER "HIGH IMPACT" DISTRICTS WAS A STATE POLICY FOLLOWED IN MISSISSIPPI CONGRESSIONAL REDISTRICTING.

The District Court's preference for the Simpson plan (and its rejection of the Kirksey plans) was based on its finding that the Joint Congressional Redistricting Com-

---

visors of Hinds County, 554 F.2d 139 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977), struck down as unconstitutional the same Hinds County districts (used as county supervisors' districts) disapproved by this Court in *Connor* v. *Finch* (see 554 F.2d at 141).

[13] As this Court said in *City of Rome* v. *United States*, 446 U.S. 156, 186 n. 22 (1980), a Section 5 preclearance case, current voting-age population data are "more probative" of whether or not dilution exists "because they indicate the electoral potential of the minority community." Accord: *Kirksey* v. *Board of Supervisors of Hinds County, supra*, 554 F.2d at 149-50.

mittee, chaired by Rep. Thomas H. Campbell, III (J.S., App. A, p. 4a), and the Mississippi Legislature adopted as a state policy, in enacting the "least change" plan, of establishing "two districts with 40% or better black population" (*id.*, p. 12a). The Simpson plan was thus preferred by the District Court because it concluded, under *Upham* v. *Seamon*, *supra*, that it was obliged to effectuate this political policy of the state. The District Court's finding regarding this purported state policy was based on the trial testimony of Rep. Campbell himself (Tr. 133-250).

In a subsequent deposition, taken on March 16, 1983 in *Mississippi* v. *Smith*, the D.C. District Court Section 5 preclearance case, Rep. Campbell contradicted his *Brooks* v. *Winter* trial testimony to say that this 40 percent "high impact" theory was only his observation of the legislative behavior of his colleagues, and that it was not the recommendation of the Legislature's Joint Congressional Redistricting Committee nor a criterion, guideline, or goal in Mississippi congressional redistricting:

> Q. Was the joint committee's recommendation to the legislature drawn with the intent of coming out of districts which were forty percent black or better?
>
> A. No.
>
> Q. Was this a criterion or guideline in the drafting of the joint committee's recommendation?
>
> A. No.
>
> Q. Was it a goal?
>
> A. No, with the exception that we were trying to prevent retrogression of the black populations that were in those districts previously and they happen to be above forty percent in two of the districts so that we were trying to prevent any diminution of those percentages. I don't know if that's what you're talking about or not.
>
> Q. Was the racial percentage a criterion that you followed?
>
> A. In that way, yes.
>
> Q. But, that was only to not reduce the percentages of the existing districts?
>
> A. That's right.

Q. It wasn't to achieve forty percent or better as a goal?

A. No.

Deposition testimony of Rep. Thomas A. Campbell, III, pp. 75-76, *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C.).[14]

This new testimony shows that the finding of the District Court in this case that there was a "legislative preference for two high black impact districts" (J.S., p. 13a) is clearly erroneous and that there was no such state policy. Rep. Campbell's new testimony goes to the heart of the District Court proceedings in this case, and requires reversal of the District Court's decision.

CONCLUSION

The District Court's decision should be reversed and the case remanded to the District Court for the formulation of an interim court-ordered plan which remedies the Section 5 objection in this case and provides black voters of Mississippi with an opportunity to elect candidates of their choice.

Respectfully submitted,

WILLIAM L. ROBINSON
*FRANK R. PARKER
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

Attorneys for Appellants

*Counsel of Record

[14] A copy of this deposition will be filed with the Clerk.